Supreme Court, U.S.
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No. 91-1004

In The

Supreme Court of the United States

October Term, 1991

ROSANN C. SCHEETZ and KENNETH L. SCHEETZ, JR.,

Petitioners,

-v-

THE MORNING CALL, INC., TERRY L. MUTCHLER and JOHN DOE AND/OR JANE DOE,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Does a crime victim have a reasonable expectation of privacy in any of the information which the victim tells the police when reporting a crime, where no charges are filed and where the information remains undisclosed in the confidential, nonpublic portion of a police report for sixteen months?

2. Are a reporter and a newspaper protected by the First Amendment where the reporter conspires with a source to unlawfully acquire the confidential, nonpublic portion of a police report and the newspaper publishes the contents?

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OPINIONS BELOW

The Opinion of the Court of Appeals for the Third Circuit has not been officially reported. It is set forth in full in Appendix A at 1a-29a. The Opinion of the United States District Court for the Eastern District of Pennsylvania has been reported at 747 F. Supp. 1515 (E.D. Pa. 1990), and is set forth in full in Appendix B, at 30a-132a.

STATEMENT OF JURISDICTION

The Judgment of the Court of Appeals for the Third Circuit was filed October 3, 1991. The Petitioners filed a timely Petition for Rehearing and Suggestion for In Banc Rehearing, which was denied October 31, 1991.

The jurisdiction of this Court to review the decision of the Court of Appeals is invoked pursuant to 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment One:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

United States Constitution, Amendment Fourteen, Section 1:

All persons or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Pennsylvania "Right-to-Know" Law, 65 P.S. Sections 66.1 et seq. (Full Text at Appendix D).

STATEMENT OF THE CASE

The Petitioners, Rosann C. Scheetz and Kenneth L. Scheetz, Jr., are husband and wife; Kenneth L. Scheetz, Jr., is a patrolman with the Allentown, Pennsylvania, Police Department.

On January 14, 1988, a domestic dispute at their home culminated in Mr. Scheetz striking Mrs. Scheetz. The police were summoned and members of the Allentown Police Department responded. The investigating officers questioned Mr. Scheetz. As a result of their interview and observations, they prepared their standard police report, which included an "offense/incident" sheet and an "investigative supplement." The "offense/incident" sheet described a "domestic disturbance" reported by "Mrs. Scheetz" at the Scheetzes' residence. The "investigative supplement" detailed

the additional information which they gathered concerning the incident.

Prior to the police officers' arrival, Rosann Scheetz had driven to the police station. There she met with two ranking officers who explained the options available to her, including the filing of criminal charges, a disciplinary complaint with the department, and a petition pursuant to Pennsylvania's Protection from Abuse Statute. They also took a detailed statement from her concerning the incident, which was recorded in another "investigative supplement." After much discussion, Mrs. Scheetz determined not to file criminal or disciplinary charges or seek an abuse order. The officers complied with her wishes and did not file charges.

Within the next several days, Kenneth Scheetz spoke to his superior, the Allentown Chief of Police, who recommended marriage counseling. The Scheetzes determined to attempt counseling and a counseling session was scheduled.

On January 22, 1988, the Chief of Police met with Kenneth Scheetz and questioning him concerning the steps which they were taking to resolve their personal problems. Having been advised that they were seeking marital counseling, the Chief of Police prepared another "investigative supplement" which reflected that fact.

After the January 14, 1988, incident Petitioners successfully rebuilt their marriage. In addition, Officer Scheetz performed exceptionally as the police department warrant officer. In

May of 1989, the Chief of Police named him Policeman of the Year.

Sometime after Mr. Scheetz received the award, Morning Call newspaper reporter Terry L. Mutchler became aware that there had been a domestic incident at the Scheetzes' home approximately sixteen months earlier. Having been unable to secure a copy of the investigative supplements through normal police channels (because police regulations restricted the release of anything but the offense/incident sheet), she contacted a police source, who stole it for her.

After she obtained the investigative supplements but before the newspaper articles were published, she met with the Chief of Police and the Assistant Chief of Police and told them that she was in possession of the stolen

police report. She admitted that she had conspired to get it. Both the Chief of the Police and the Assistant Chief of Police advised her that she was in possession of stolen property and tried to dissuade her from printing the contents.

Newspaper articles were published on May 25 and May 26, 1989. Those articles detailed the incident at the Scheetzes' home. They disclosed that the Scheetzes were going to marriage counseling and included a claim that Kenneth L. Scheetz had previously refused marital counseling; they also referred to prior domestic problems. All of this information was secured from the confidential investigative supplements portion of the police report.

Petitioners filed a federal civil rights action pursuant to 28 U.S.C.

Section 1983, alleging that a conspiracy among the Respondents (one of whom was the unnamed police officer who stole the report) resulted in a deprivation of their constitutional right to privacy. After limited discovery, the District Court granted the Motion for Summary Judgment of Respondents the Morning Call, Inc., and Terry L. Mutchler. The Court concluded that the Petitioners' privacy interests were outweighed by the Respondents' First Amendment rights. The Court of Appeals for the Third Circuit denied Petitioners' appeal, finding that Petitioner Rosann C. Scheetz had no reasonable expectation of privacy in information supplied to the police.

REASONS FOR GRANTING THE WRIT

A. A victim has a reasonable expectation that information contained in the investigative portion of a police report will be used solely for law enforcement purposes and will not be released to the public in a newspaper article, under circumstances where no charges are filed and the report was non-public for sixteen months.

The Court of Appeals for the Third Circuit, in a two to one panel decision, held that "the information contained in a police report is not protected by the confidentiality branch of the constitutional right of privacy." Scheetz v. The Morning Call, Inc., ____ F.2d _____, _____ (3d Cir. 1991), slip opinion at 11, Appendix at 11a. That finding was based upon the conclusion

that a victim who reports the details of a crime to a police officer has no reasonable expectation that the information will remain private. Id. In rendering its decision, the Court of Appeals relied on the fact that the "police could have brought charges without [the Petitioner's] concurrence, at which point all the information would have wound up on the public record, where it would have been non-confidential." Id.[1]

In Whalen v. Roe, 429 U.S. 589, 51 L. Ed.2d 64 (1977), this Court held that "[t]he cases sometimes characterized

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[1] The published information included facts supplied by Mrs. Scheetz on the night of the incident and additional information provided by Mr. Scheetz to his superior, the Chief of Police, when he met with him approximately eight days after the incident. The Opinion does not distinguish between the two different sources or the differing contexts of the disclosures.

as protecting 'privacy' have in fact involved at least two different kinds of interests. One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of personal decisions." 429 U.S. at 598-600, 51 L. Ed.2d at 73 (footnotes omitted).[2]

In determining whether there is constitutional protection, this Court has

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[2] Both prongs of the privacy right are asserted here. Information concerning the Petitioners' marital discord, the incident which occurred between them in their home, past discussions concerning marital counseling during which husband refused counseling, and the couple's ultimate decision to attend counseling, implicate the Petitioners' privacy rights under the confidentiality branch. Their decision to forgo further counseling because of their fear that the counseling would be publicized implicates the autonomy branch. Issues concerning marriage and family relationships have been found to be protected privacy interests. Paul v. Davis, 424 U.S. 693, 713, 47 L. Ed.2d 405, 421 (1976).

considered whether the person asserting the privacy right has a reasonable expectation that the information is private. Nixon v. Administrator of General Services, 433 U.S. 425, 458, 53 L. Ed.2d 867, 900 (1977). If a person voluntarily discloses private information, there is no assertable privacy right. Id. at 459, 53 L. Ed.2d at 901. However, information supplied to the government for a limited purpose is not thereby rendered public for all purposes. Whalen v. Roe, supra; United States Department of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749, 770, 103 L. Ed.2d 774, 794 (1989) ("In sum, the fact that "an event is not wholly 'private' does not mean that an individual has no interest in limiting disclosure or dissemination of the information."" Quoting Rehnquist,

Is an Expanded Right of Privacy Consistent with Fair and Effective Law Enforcement?, Nelson Timothy Stephens Lectures, University of Kansas Law School, pt 1, p 13 (September 26-27, 1974)).

The decision of the Court of Appeals has significant implications because it holds that, in the case of a crime victim, supplying the details of one's victimization to the police renders all of the information public for all purposes. As a result, a victim has no constitutionally cognizable privacy right in the circumstances of the victimization if he or she reports the crime.

It does not appear that this Court has ever decided whether victims are reasonable in expecting that the facts disclosed to the police will be used solely for law enforcement purposes.

While not having addressed the scope of a victim's constitutionally-grounded privacy rights, this Court has repeatedly recognized the substantial societal interest in preserving the privacy of victims. In The Florida Star v. B.J.F., 491 U.S. 524, 105 L. Ed.2d 443 (1989), protecting the privacy of victims of sexual offenses, insuring their physical safety, and encouraging victims of crimes to report offenses without fear of exposure, were described as undeniably "highly significant interests, . . " 491 U.S. at 537, 105 L. Ed.2d at 457-58.

> [T]he government retains ample means of safeguarding significant interests upon which publication may impinge, including protecting a rape victim's anonymity. To the extent sensitive information rests in private hands, the government may under some circumstances forbid its nonconsensual acquisition, thereby bringing outside of the Daily Mail principle the publication of any information so acquired. To the extent sensitive information is in the government's

> custody, it has even greater power to forestall or mitigate the injury caused by its release. The government may classify certain information, establish and enforce procedures ensuring its redacted release, and extend a damages remedy against the government or its officials where the government's mishandling of sensitive information leads to its dissemination.
> Id. at 534, 105 L. Ed.2d at 455-56.

It is difficult to reconcile the quoted language with the Court of Appeals' conclusion that a victim's reporting of a crime is a surrender of all privacy expectations if the police have the option to file charges without the victim's consent. If the decision is allowed to stand, the price of reporting a crime is a waiver of the constitutional right to privacy. According to the panel majority's opinion, the Constitution provides no protection regardless of what the reported information is used for, even if no charges are actually filed,

and irrespective of when or under what circumstances the disclose occurs.

The decision will impact on both the rights of victims and the effectiveness of law enforcement. Victims of crimes, particularly victims of spousal abuse or sexual offenses, will be unable to reasonably assume that the oftentimes humiliating details of the offense will be used for the limited purpose of investigation and possible prosecution. Domestic disturbances between spouses naturally engender tremendous concern that details will become public. Embarrassing and highly personal facts will often be involved and a victim's concern about public disclosure will be at its apex. Crime victims are involuntary participants in the criminal justice system. The decision of the Court of Appeals raises

an additional impediment - the fear of uncontrolled dissemination - to the hurdles that already confront victims.

Society has a significant interest in encouraging victims to report crimes. This is particularly true in the case of spouse abuse, an offense that will often go unreported. Anything which will discourage the reporting of crimes will have a negative impact on law enforcement.

Whenever sensitive information must be supplied to the government, this Court has been careful to emphasize the significance of regulatory and statutory protections controlling its improper dissemination. Whalen v. Roe, 429 U.S. 589, 51 L. Ed.2d 64 (1977). Regulations such as existed in Whalen have been found sufficient to satisfy privacy concerns in the face of arguments that the risk of

disclosure was too great to satisfy the constitutional standard.

It is reasonable to assume that the existence of these controls will heighten a person's expectation that the information disclosed will be used only for the purpose for which it was supplied. The necessity of these controls may be rooted in the Constitution.

> . . . [T]he enforcement of the criminal laws . . . require[s] the orderly preservation of great quantities of information, much of which is personal in character and potentially embarrassing or harmful if disclosed. The right to collect and use such data for public purposes is typically accompanied by a concomitant statutory or regulatory duty to avoid unwarranted disclosures. . . . [I]n some circumstances that duty arguably has its roots in the Constitution, . . .
> Whalen v. Roe, 429 U.S. at 605, 51 L. Ed.2d at 77.

In Pennsylvania a state statute restricts the disclosure of investigative

information,[3] and in Allentown police department regulations limit the disclosure of the facts contained in an investigative supplement to release by superior officers and then only as is necessary to advance a significant law enforcement interest.[4] A subjective expectation of privacy is legitimate if society is prepared to recognize it as reasonable. Minnesota v. Olson, ____ U.S. ____, ____, 109 L. Ed.2d 85, 92

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[3] The Pennsylvania Right-to-Know Law (65 P.S. Sections 66.1 et seq.) prohibits unlimited public access to investigative information. Pennsylvania appellate courts have interpreted the Act to prohibit release of police reports even if the request for the report is made by the victim (Sullivan v. City of Pittsburgh, 127 Com. 339, 561 A.2d 863 (1989), or by the police officer who was the subject of an internal investigation. Barton v. Penco 292 Pa. Super 202, 436 A.2d 1222 (1981).

[4] The regulations were put into place after the police department consulted with and obtained the concurrence of the Respondent The Morning Call.

(1990). The Court of Appeals found, as a matter of constitutional law, that an expectation based upon a legislative enactment and law enforcement regulations was unreasonable.

In reaching its decision, the panel majority concluded that information was public because the police could have filed charges.[5] This Court has held that even public information may contain a privacy component where the information has remained nonpublic for an extended period of time. United States Department of Justice v. Reporters Committee for Freedom of the Press, supra at 767, 103 L. Ed.2d at 792 (interpreting the Freedom

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[5] Even if charges had been filed, the information which forms the basis for the lawsuit, concerning Petitioners' attempts to right their marriage, their past marital problems, and their marital counseling, is not of the type which could be expected to become public during a prosecution.

of Information Act); Department of Air Force v. Rose, 425 U.S. 352, 48 L. Ed.2d 11 (1976). The Court of Appeals accords no weight to the sixteen month passage of time. This means that victims are apparently never safe from disclosure regardless of when that disclosure occurs.

This case raises important issues for victims and law enforcement. Respectfully, the Court of Appeals' resolution of these issues is at variance with the law as set down by this Court.

B. A reporter and a newspaper are not protected by the First Amendment where the reporter engages in unlawful conduct to acquire the confidential portion of a police report and the newspaper publishes the contents.

This case presents an additional, significant constitutional issue: does the First Amendment insulate a newspaper and a reporter from civil damages where they unlawfully acquire a nonpublic, confidential police investigative report and publish private information obtained from that report. Because of its holding that a victim has no reasonable expectation of privacy in information supplied to the police, this issue was not reached by the Court of Appeals panel majority; Circuit Judge Mansman found, in dissent, that "where confidential information, protected by the

constitutional guarantee of privacy, is unlawfully acquired, . . . the first amendment does not afford the press a defense against civil liability." Scheetz, supra, at 29 (emphasis in original), Appendix at 29a.

In Cohen v. Cowles Media Company, ____ U.S. ____, 115 L. Ed.2d 586 (1991), this Court recently reaffirmed that the press is subject to the same legal constraints as the general populace. The Court held that the First Amendment did not bar a source from recovering damages from a newspaper where his name was published after he received a promise of confidentiality. Justice White wrote:

> [t]his case however, is . . . controlled by . . . the equally well-established line of decisions holding that generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability

> to gather and report the news. As the cases relied on by respondents recognize, the truthful information sought to be published must have been lawfully acquired. The press may not with impunity break and enter an office or dwelling to gather news.
> Id. at ____, 115 L. Ed.2d at 596-97.

There is no doubt that the criminal laws which prohibit the unlawful acquisition of police reports apply to a reporter and a newspaper.[6] Branzburg v. Hayes, 408 U.S. 665, 691, 33 L. Ed.2d 626, 645 (1972) ("Although stealing documents or private wiretapping could provide newsworthy information, neither reporter nor source is immune from

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[6] Prior to publication, the reporter admitted to Allentown's Chief of Police and Assistant Chief of Police that she was in possession of a report which she knew was stolen and that she had conspired to obtain it. Theft, receiving stolen property, and conspiracy all violate Pennsylvania's criminal laws. 18 Pa. C.S.A. Sections 3921, 3925, and 903, respectively.

conviction for such conduct, whatever the impact on the flow of news."). At least with respect to criminal sanctions, the unlawful acquisition (as distinct from publication) of private information enjoys no First Amendment protection.

The majority in Cohen also questioned whether information acquired by the failure to honor a promise was "lawfully" obtained. Id. at ____, 115 L. Ed.2d at 598. The acquisition of the information here was "at least one degree closer to being unlawful, . . ." than the means used to acquire the information in Cohen v. Cowles Media Company. Scheetz, supra at 27, Appendix at 27a (Mansmann, J. dissenting). The lawfulness of the acquisition of information is a necessary component if a newspaper is to secure the First Amendment's protection. The Florida Star, supra at 533, 105 L. Ed.2d

at 455; Smith v. Daily Mail Publishing Company, 443 U.S. 97, 103, 61 L. Ed.2d 399, 405 (1979). Whether the government may punish not only the unlawful acquisition but the subsequent publication of unlawfully acquired information has not been decided by this Court. The Florida Star, supra at 535, 105 L. Ed.2d at 456, n.8; Landmark Communications, Inc. v. Commonwealth of Virginia, 435 U.S. 829, 837, 56 L. Ed.2d 1, 9 (1978).

This case therefore presents the significant and undecided constitutional question of the availability of civil damages for publication of unlawfully acquired information. At present, the media, law enforcement agencies, and victims are essentially without guidance concerning whether the media is liable for damages where it unlawfully obtains

and discloses private information.[7] It would benefit those who supply confidential information to the government, the government itself, and the press if the limits of appropriate publication were demarcated.

Doubt as to whether civil damages exist may cause the victim of a crime to be reticent in providing honest and complete information to a police department. The lack of a damage award deterrent leaves substantially less

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[7] While criminal laws may technically apply to this situation, law enforcement agencies, for practical reasons, may be hesitant to file criminal charges against a newspaper and a reporter. This is precisely the situation which arose here where the Chief of Police and Assistant Chief of Police did not know how far they could go in applying criminal laws to the newspaper. They were additionally concerned about the political repercussions. The hypothetical availability of criminal sanctions therefore provides little actual protection to the victim.

assurance that private information will remain confidential when in a government depository. The innumerable ways in which the government gathers data are undermined if accurate facts are not provided. If citizens do not trust that the information supplied is secure from publication, they will be disinclined to disclose the truth. Anything which reduces the flow of information is to the detriment of the community at large.

On the other hand, the press has a critical role to play in supplying information to the community to allow the public to make an independent analysis of whether government (in this case a police department) is working properly. The receipt of information from an informant is a not uncommon occurrence and a valuable source of news for the press. Virtually all of the documents supplied

to the press by an informant will be owned by someone other than the source.[8] With the law unresolved, a newspaper is left without direction as to whether the publication of unlawfully obtained information will result in civil damages, thus creating the risk of "timidity and self-censorship . . ." Cox Broadcasting Corporation v. Cohn, 420 U.S. 469, 496, 43 L. Ed.2d 328, 350 (1975). Both journalism and the flow of information necessary for the efficient administration of criminal justice are potentially chilled.

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[8] There may be a multitude of possibilities confronting a reporter engaged in newsgathering. May a document be used if the reporter knows it is stolen? Is a newspaper acting unlawfully if it publishes information which a reporter gathered from a nonpublic government document, the receipt of which was not solicited? When has a reporter crossed the line between acquiring information from a source and conspiring with the source?

CONCLUSION

The granting of this Petition for Certiorari would provide this Court with the opportunity to decide two important and unsettled questions of constitutional law: whether a victim retains a reasonable expectation of privacy in information supplied to the police and whether the First Amendment bars civil damages for the publication of unlawfully obtained information. Both have a significant impact on victim's rights, the flow of information to law enforcement, and newsgathering by the press. Respectfully, this presents an appropriate case for the Supreme Court to address these presently undefined areas of constitutional law.

Respectfully submitted,

JAMES T. HUBER, ESQUIRE

Filed October 3, 1991

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 90-1783

ROSANN C. SCHEETZ;
KENNETH L. SCHEETZ, JR.,
Appellants

V.

THE MORNING CALL, INC.;
TERRY L. MUTCHLER;
JOHN DOE and/or
JANE DOE

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT
OF PENNSYLVANIA
(D.C. Civil Action No. 89-06755)

Argued May 7, 1991

Before: MANSMANN and NYGAARD, *Circuit Judges*, and RONEY, *Circuit Judge**

(Opinion Filed October 3, 1991)

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* Honorable Paul H. Roney, United States Senior Circuit Judge for the Eleventh Circuit Court of Appeals, sitting by designation.

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OPINION OF THE COURT

NYGAARD, *Circuit Judge*

In this section 1983 action, plaintiff-appellants Kenneth and Rosann Scheetz allege that the defendants, a local newspaper, a reporter, and an unnamed state actor, conspired to deprive the Scheetzes of their constitutional right of privacy. The district court granted summary judgment in favor of the defendants. We will affirm.

I.

Kenneth Scheetz is a police officer in the City of Allentown. Rosann Scheetz is his wife. In the course of an argument between them in their home in January of 1988, Kenneth struck Rosann. Rosann left the house, but returned approximately a half an hour later. The argument resumed, and Kenneth again struck Rosann.

Rosann called the Allentown police. Two officers responded and prepared a standard "offense/ incident" report, consisting of a face sheet and supplemental reports. The "face sheet" of this report[1] stated that Rosann Scheetz had reported a domestic disturbance, that two police cars had responded, and that Rosann had left the home.

In the meantime, Rosann had driven to the Allentown police station, apparently with the intention of filing a Pennsylvania Protection From Abuse Petition. The officers who interviewed Rosann prepared two "supplemental reports" and made them part of the file. They reveal that Rosann stated that her husband had beaten her before and had refused counseling. The police gave Rosann three options: file criminal charges, request a protection from abuse order, or initiate department disciplinary action against Kenneth. These supplements also note that Rosann had visible physical injuries, that Rosann did not want to return home and that she was permitted to spend the night in the shift commander's office.

Chief Wayne Stephens filed a third supplement to the report. He had spoken to Kenneth about the incident, and the third supplement memorialized this fact, as well as Kenneth's statement to the Chief that he and his wife were scheduled to speak with a marriage counselor.

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1. The "face sheet" is a public document similar to a police blotter. The parties agree that this document is a public record. The parties dispute whether the "supplemental reports" are public records available under Pennsylvania's Right to Know Law. There is some evidence that these reports were generally available, subject to the approval of a police supervisor.

None of the supplements indicated that the Chief took any disciplinary action against Kenneth.

Shortly after the incident, Kenneth Scheetz was named "Officer of the Year" by Chief Stephens. Several months later, as part of "Respect for Law Week," press releases and photos of Kenneth were released. A dinner and official ceremony were held in Kenneth's honor. The Morning Call ("The Call"), a local newspaper, published a story and photo on this honor.

Terry Mutchler, a reporter for The Call, became interested in investigating the prior incident involving Kenneth and Rosann. Another reporter from the paper had tried to get the police report from the police, who refused to release it. Mutchler's request for a copy of the report from the department was also formally refused. Mutchler nonetheless managed to get a copy of the report.[2]

Mutchler then interviewed Chief Stephens about the incident. Chief Stephens initially denied the incident, but when confronted with Mutchler's

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2. There is some dispute as to how Mutchler obtained a copy of the report. Mutchler submitted an affidavit in which she stated that she spoke to various confidential sources to see if any of them had a copy of the report. Mutchler averred that she did not conspire with or encourage anyone to steal the report. A source then showed her a copy of the report, and she copied information from it. Mutchler copied information from both the "face sheet" and the "supplemental reports." The plaintiffs cannot counter this affidavit, primarily because Mutchler's source remains confidential. Chief Stephens stated at his deposition that he told Mutchler that the report was stolen, but he also stated that he did not suspect that Mutchler had stolen it. Because we decide this appeal on other grounds, we need not resolve this dispute over how the report was obtained.

information, he claimed that the report was stolen and refused further comment. Chief Stephens did, however, offer his insights into the subject of spousal abuse, stating "people fake it" and "women...tear their dresses and rip up their bras and say they were raped." Mutchler also interviewed Deputy Chief Monaghan, who offered assorted rationalizations for why no follow up had been done on the Scheetz incident. The Scheetzes refused comment on the incident.

The Call published an article by Mutchler titled "Police didn't investigate assault complaint against officer." Eight paragraphs of the article were comprised of quotes from the police report of the beating incident which detailed the injuries Rosann received. The bulk of the article, however, focused on the lack of investigation and follow-up by the police department. Chief Stephens was quoted as saying that the incident had not been investigated. The article also quoted the comments Chief Stephens had made to Mutchler about domestic abuse, as well as Deputy Chief Monaghan's explanations for why no charges were pressed. The last two columns of the article consisted of quotes from Kenneth's superiors praising his work.

Apparently Chief Stephens's comments provoked a number of calls to the department questioning his commitment to the protection of women. At Chief Stephens's request, The Call sent a different reporter to interview Stephens the next day. The Call then published an article entitled "Chief says beating report investigated like others." In this article, Stephens attempted to clarify his earlier statements. He stated that the incident with Scheetz had been investigated. He explained he

had initially thought he was being asked if he had *personally* investigated the complaint, and that was why he said no investigation was done. He also attempted to clarify his statements about domestic abuse. Three paragraphs towards the end of the article briefly recap the events listed in the police reports.

Kenneth and Rosann then sued Mutchler, The Call, and "John or Jane Doe." The complaint alleged that Mutchler and The Call had conspired with an unknown state actor (the Doe defendant) to deprive the Scheetzes of their constitutional right to privacy in violation of 42 U.S.C. § 1983. The complaint also raised several pendent state law claims.

The Call and Mutchler filed an answer that denied liability and raised jurisdictional and other defenses. After limited discovery, The Call and Mutchler filed a motion to dismiss the Doe defendant and to dismiss the action for lack of subject matter jurisdiction. The district court considered the motion to dismiss and to dismiss the Doe defendant and decided to deny it, but indicated that it would reconsider the issues after reasonable discovery had been completed. After the defendants refused to answer questions about Mutchler's source, the Scheetzes filed a motion to compel. Defendants then renewed their prior motions, and filed additional motions for judgment on the pleadings, summary judgment and a protective order.

The district court granted the defendants' motion for summary judgment in part, denied it in part, granted judgment to the defendants on the § 1983 claim, dismissed the pendent state claims,

dismissed the Doe defendant and dismissed all remaining motions as moot. The Scheetzes appeal.

The district court had jurisdiction over the subject matter of this section 1983 action pursuant to 28 U.S.C. §§ 1331 & 1343. We have jurisdiction over this appeal from a final order by the district court pursuant to 28 U.S.C. § 1291.

Our review of a grant of summary judgment is plenary. Summary judgment is appropriate if there is no genuine dispute of material fact, and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). In reviewing a grant of summary judgment, we accept all of the non-moving party's allegations as true and draw all factual inferences in the non-moving party's favor. *Erie Telecommunications, Inc. v. City of Erie*, 853 F.2d 1084, 1093 (3d Cir. 1988).

II.

The district court concluded that the Scheetzes had alleged a *prima facie* section 1983 violation, but that the first amendment rights of the defendants outweighed the Scheetzes' privacy interests. The defendants invite this court to affirm on the alternative ground[3] that this claim is not actionable under section 1983. Because we conclude that the Scheetzes have not alleged a

3. Defendants also invite this court to affirm on the alternative ground that plaintiffs failed to establish a conspiracy between The Call, Mutchler, and a state actor. Such a conspiracy is necessary to establish § 1983 liability on behalf of the private actors. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970); *Labov v. Lalley*, 809 F.2d 220 (3d Cir. 1987). Because we will affirm on the ground that plaintiffs have failed to allege a violation of a constitutional privacy right, we need not reach this issue.

violation of a constitutionally protected privacy interest, we will affirm.

The defendants rely on dicta in *Paul v. Davis*, 424 U.S. 693 (1976) to support their argument that "garden variety" invasion of privacy claims are not actionable under section 1983. *Paul* involved a plaintiff who had been arrested for shoplifting and acquitted. His name and photo, however, appeared on a flyer of "known shoplifters" circulated to merchants by a group of police chiefs. The plaintiff sued under section 1983, alleging that he had a due process liberty interest in his reputation and that the police chiefs had violated his constitutional rights by defaming him.

The Supreme Court rejected the proposition that reputation alone was a liberty or property interest within the meaning of the due process clause. In dicta, the Court went on to consider the alternative argument that the police chiefs' action constituted a violation of the plaintiff's right to privacy. After first noting that privacy decisions had been limited in the past to family and procreative matters, the Court concluded that publication by the state of an official act such as an arrest could not constitute invasion of the constitutional right to privacy. *Paul*, 424 U.S. at 713.

The very next year, however, the Court held in *Whalen v. Roe*, that the right to privacy extends to both "the individual interest in avoiding disclosure of personal matters, and...the interest in independence in making certain kinds of important decisions." 429 U.S. 589, 599 (1977). *Whalen* recognized that the information contained in medical records is constitutionally protected under the confidentiality branch of the privacy right.

Thus, some confidential information is protected under the confidentiality branch of the right to privacy, the dicta in *Paul* notwithstanding.[4] *See, e.g., Nixon v. Administrator of General Services*, 433 U.S. 425, 457-58 (1977)(president has constitutionally protected privacy right in personal papers). Accordingly, the Scheetzes in this case contend that the information contained in the police incident report is similarly protected by the federal right.

Although cases exploring the autonomy branch of the right of privacy are legion, the contours of the confidentiality branch are murky. We have recognized that some confidential information, such as medical records, is constitutionally protected under the confidentiality branch of the federal privacy right. *United States v. Westinghouse Elec. Corp.*, 638 F.2d 570 (3d Cir. 1980); *c.f. Fraternal Order of Police, Lodge No. 5 v. Philadelphia*, 812 F.2d 105 (3d Cir. 1987) (§ 1983 action by officers challenging various employment tests and questionnaires as violative of privacy rights). Other courts have similarly recognized that § 1983 may be used to redress violations of a constitutional confidentiality right. *Borucki v. Ryan*, 827 F.2d 836 (1st Cir. 1987)(allowing § 1983 action based on disclosure of psychological records, but concluding that qualified immunity shields officers because right was not clearly established at time of violation); *Fadjo v. Coon*, 633 F.2d 1172, 1175 (5th Cir. Unit B 1981)(plaintiff

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4. *Paul* can be reconciled with *Whalen* since the information at issue in *Paul* (the fact of plaintiff's arrest for shoplifting) is not the kind of information entitled to constitutional protection.

stated a claim under § 1983 where state officials disclosed intimate, personal information to insurance companies).

Concluding that violations of the confidentiality right of privacy may be actionable under § 1983 does not, however, end our inquiry. Although defendants are wrong in arguing that *Paul* prohibits any privacy § 1983 action, we conclude that they correctly argue that the Scheetzes did not have a constitutionally protected privacy interest in the information they divulged in a police report.[5] We note that the question of whether a federal constitutional right to privacy has been violated is a distinct question from whether a federal statutory right to privacy (*i.e.* under the Freedom of Information Act) or a state common law right to privacy has been violated. *United States Dept. of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 109 S.Ct. 1468, 1476 n. 13 (1989). Reference to state law on confidentiality is not particularly

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5. Our conclusion is bolstered by a line of cases refusing to recognize a section 1983 action because the type of information made public is not "private" in the *constitutional* sense. *See, e.g., Wade v. Goodwin*, 843 F.2d 1150 (8th Cir.), *cert. denied*, 488 U.S. 854 (1988) (publication of plaintiffs name on a list of "survivalists" did not establish a constitutional invasion of privacy since privacy only protects the most intimate matters); *Davis v. Bucher*, 853 F.2d 718, 721 (9th Cir. 1988)(concluding that actions of correctional officer, in exhibiting nude photos of inmate's wife, do not involve type of malfeasance "which demands a constitutional response"); *Pesce v. J. Sterling Morton High School*, 830 F.2d 789, 797 (7th Cir. 1987)(state statute that required school psychologist to disclose that student had engaged in sexual relations with teacher did not violate federal right to confidentiality).

useful to this analysis, so case law cited by the parties as to Pennsylvania confidentiality law cannot control the *federal* constitutional right.

We conclude that the information contained in a police report is not protected by the confidentiality branch of the constitutional right of privacy. Although the outlines of the confidentiality right are not definite, the information that has been protected in other cases was information that the disclosing person reasonably expected to remain private. In reporting this potential crime to the police, Rosann Scheetz could not reasonably expect the information to remain secret. The police could have brought charges without her concurrence, at which point all the information would have wound up on the public record, where it would have been non-confidential. *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 494-495 (1975)(privacy interest fades when information is in the public record). This information is not like medical or financial records (which have been accorded some constitutional protection by this court, *see Fraternal Order of Police, supra*) where there is a reasonable expectation that privacy will be preserved. When police are called, a private disturbance loses much of its private character.[6] We conclude that the information Rosann Scheetz disclosed in the police reports is not constitutionally protected.

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6. Of course the police may have an interest in keeping investigative information private. They may protect this interest by appropriate regulation. The police's interest in the privacy of the information should not be confused with the individual's interest in the information he or she reports.

III.

For the foregoing reasons, we will affirm the district court's grant of summary judgment to the defendants.[7]

MANSMANN, *Circuit Judge*, dissenting.

As aptly articulated in *Paul v. Davis*, the delineation of the constitutional right to privacy "def[ies] categorical description." 424 U.S. 693, 713 (1976). *See* Kramer, *The Full-Court Press: Sacrificing Vital Privacy Interests on the Altar of First Amendment Rhetoric*, 8 Cardozo Arts & Entertainment 113, 118 (1989) (quoting one commentator as stating "[p]erhaps privacy is not given the recognition it deserves as a fundamental value simply because the concept is so difficult to formulate or justify in non-subjective terms") (footnote omitted). Despite the difficulty in drawing this subjective line, I believe that the Scheetzes have presented a constitutionally protected privacy interest in the details of their marital disturbance and counseling.

Thus I would then analyze The Morning Call's first amendment right to publish this private information, considering the public significance of the information, and would also address the fact that the confidential information was unlawfully

7. The Scheetzes also claim the defendants' actions interfered with their autonomy privacy right. The Scheetzes' argument is that they have an autonomy right to seek marital counseling, and that the defendants have "chilled" that right by publishing the article. The Scheetzes claim that they would hesitate before seeking further counseling out of fear that the counseling would be reported in the newspaper. We have examined this claim and find it to be without merit.

acquired. I concur with the district court's determination that the first amendment values outweigh the Scheetzes' privacy interest, but I would vacate the order of the district court and remand for trial, nevertheless, because if proven, the fact that The Call knowingly acquired the information in an unlawful manner should permit the plaintiffs to recover. For these reasons, I respectfully dissent.

I.

As the majority notes, we have recognized a constitutionally protected privacy interest in such personal information as an employee's medical records. *United States v. Westinghouse Electric Co.*, 638 F.2d 570 (3d Cir. 1980). *See also Fadje v. Coon*, 633 F.2d 1172 (5th Cir. 1981) (subpoenaed testimony of information concerning "the most private details of [plaintiff's] life"); *Plante v. Gonzalez*, 575 F.2d 1119 (5th Cir. 1978) (personal financial information), *cert. denied*, 439 U.S. 1129 (1979). *But see J. P. De Santi*, 653 F.2d 1080 (6th Cir. 1981) (not recognizing a constitutional privacy right in disclosure of confidential juvenile social history records).

Nonetheless, the majority did not find a privacy interest in "the information contained in the police report." I agree that some of the information contained in the police report, specifically that information contained in the "Offense/Incident Report," is not protected under a constitutional privacy interest. *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) (no liability for disclosure of a rape victim's name already disclosed in the public record). Because the

"Offense/Incident Report" is classified as a public document under the police department's policy, that information was not treated as confidential. In fact, Kenneth Scheetz admitted that he considered this information to be a matter of public record. Moreover, one who reports an incident to the police cannot reasonably expect that certain threshold factual items – the occurrence of an incident, its category or general description, the time, address and identity of the complainant – will remain confidential.[1] Therefore, the information contained in the "Offense/Incident Report" is not information protected from disclosure by a constitutional privacy interest. *See also* Prosser, *Privacy*, 48 Calif. L. Rev. 383, 395-96 (1960) (noting "the effect of the fact that the matter made public is already one of public record. If the record is a confidential one, not open to public inspection . . . it is not public . . ." for purposes of the tort of invasion of privacy) (footnote omitted). I therefore agree with the majority that there is no privacy interest in the facts, contained in the "Offense/Incident Report," that "Mrs. Scheetz" reported a "disturbance" at "2616 Appel St. SW, Allentown" on January 15, 1988, at 10:06 p.m., described as a "husband/wife dispute settled when wife left."

Some of the information reported by The Call, however, was contained only in *confidential* portions of the police report entitled "Investigative Supplements" and was not discernable from the public portion of the report. That information

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1. Indeed, much of this information is available over police scanners and is routinely published in local newspapers.

detailed the private facts of the Scheetzes' marital counseling and precise details of their marital disturbance, including a description of Rosann's injuries and her statements. Since this information is clearly confidential, I would then examine the nature of the Scheetzes' privacy interest in keeping it confidential.

Identified in *Whalen v. Roe* as "the individual interest in avoiding disclosure of personal matters," the confidentiality branch of the constitutional right to privacy has been found applicable to disclosure of the details of one's personal life. 429 U.S. at 599. *See, e.g., Fraternal Order of Police, Lodge No. 5 v. City of Philadelphia*, 812 F.2d 105 (3d Cir. 1987) (medical and financial information); *Westinghouse*, 638 F.2d at 570 (employee's medical records). In *Whalen*, the Court quoted from Justice Brandeis's dissent in *Olmstead v. United States* to characterize the privacy interest as "'the right to be let alone' as 'the right most valued by civilized men.'" 429 U.S. at 599 n.25 (quoting *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)). Another formulation suggests that the confidentiality branch consists of "the right of an individual not to have his private affairs made public by the government." *Whalen*, 429 U.S. at 599 n.24 (quoting The Private I, The University of Chicago Magazine, 7, 8 (Autumn 1976)).

"In determining whether information is entitled to privacy protection, we have looked at whether it is within an individual's reasonable expectations of confidentiality." *Fraternal Order of Police*, 812 F.2d at 112. Further, "[t]he more intimate or personal the information, the more justified is the expectation that it will not be subject to public

scrutiny." *Id.* at 812-13. Determining that prior caselaw had established that medical records were protected by a constitutional privacy interest in *Fraternal Order of Police*, we had no occasion to more fully explore the factors to consider in evaluating a reasonable expectation of confidentiality.[2]

One factor I believe relevant to whether the Scheetzes had a reasonable expectation of privacy is the extent to which they limited their own disclosure of the marital disturbance and counseling so as to prevent public knowledge.

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2. The reasonable expectation test also closely resembles the test employed when determining a right of privacy under the common law tort of invasion of privacy. *See* Restatement (Second) of Torts § 652D (1977) (defining the tort of invasion of privacy through the publication of private facts as the publication of a matter concerning the private life of another that is highly offensive to a reasonable person and that is not of legitimate public concern); Prosser, *supra*, at 391 (under the common law tort of the invasion of privacy, an intrusion must be "something which would be offensive or objectionable to a reasonable [person]").

This common law right of privacy to protect personal facts from public disclosure was first espoused in the landmark law review article *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890), by Samuel Warren and Louis Brandeis, and appears to have informed the identification of the confidentiality branch of the right to privacy in *Whalen*.

In a subsequent article Professor Prosser divided this common law tort of invasion of privacy into four categories: (1) intrusion upon the plaintiff's seclusion or solitude, or into his private affairs; (2) appropriation of the plaintiff's name or likeness; (3) publicity that places the plaintiff in a false light; and (4) public disclosure of embarrassing private facts about the plaintiff. Prosser, *Privacy*, 48 Calif. L. Rev. 383, 389 (1960).

Confiding in one's friends, family, or religious leader, for example, would not suffice to diminish a reasonable expectation of privacy against disclosure to the public at large. Disclosing information beyond one's close confidantes, however, would reduce one's reasonable expectation of privacy.

There is evidence in the record that the Scheetzes' marital disharmony was familiar to their neighbors. Some years before the marital disturbance at issue, when the Scheetzes lived in another neighborhood, a neighbor had summoned the police to what Rosann Scheetz characterized as a "shouting match." On January 14, 1988, the date of the incident reported by The Call, two police cruisers responded to Rosann's call and the first responding officer testified that he found Rosann crying outside, some 25 yards from the house. Additionally, during a previous domestic disturbance the Scheetz children had spent the night at the home of the chief of police — also a neighbor — and when Kenneth and Rosann had previously separated for a few weeks, Kenneth stayed with the chief. Given this disclosure of these limited details, the Scheetzes may not have had a reasonable expectation of confidentiality concerning disclosure to the press by a neighbor of incidents of domestic disturbances.

In addition, the marital discord was well-known to Kenneth Scheetz's fellow police officers. One officer testified in his deposition that, after the January incident, "talk [around the police department] was Scheetzie beat up his wife again. You know, it was no big thing." Another officer conveyed his opinion that the Scheetzes were thought to have a "fairly serious problem" and

there was talk both of previous episodes and the possibility of recurrences. In a phone call to a superior officer on the day following the reported incident, Kenneth explained that he and Rosann had had a fight, that she had left, and that he would not report for work because he wanted to find her. Kenneth also told other police officers and other unspecified persons about the incident.[3] The Scheetzes testified that several police officers called on them informally to lend support. Thus, had The Call received the confidential information by interviewing Kenneth's fellow police officers, the Scheetzes' privacy interest would be negligible.

As well Rosann Scheetz disclosed information concerning the incident. The morning after the incident, when she left the police department at 6:00 a.m., Rosann ate breakfast at a diner, and then removed her children from their schools. She arrived at home where Kenneth observed that she had blood on her sweatshirt, a "mark" on her cheek, and a "red area" around her left eye – all stemming from the night before.[4] Rosann also phoned her employer, an audiologist, explaining

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3. Kenneth Scheetz also testified that he discussed the incident with his mother and a marriage counselor. Because he arguably had a reasonable expectation of confidentiality in these sources, this disclosure may not have jeopardized his privacy interest.

4. Although there is conflicting testimony concerning the severity of Rosann's injuries, nevertheless, at a minimum she had discoloration around one eye, a small v-shaped laceration on her jaw bone, and some other marks on her face. She testified that she felt "light headed" enough the next week to visit a doctor about the lump on the back of her head, allegedly caused by Kenneth "pushing" her against a wall.

that she would not be reporting for work because she and her husband had had a "disagreement" that they needed to work out. After a weekend at home, Rosann returned to work; to patients, she blamed her dog for her visible injuries. Had The Call obtained its information from a nonprivileged source to whom Rosann disclosed information, the Scheetzes' privacy interest would also be negligible.

As the record discloses, the Scheetzes did not scrupulously guard the privacy of their marital discord from their family, neighbors, and co-workers. Nevertheless, neither did they take any action to disseminate these private facts in a public forum. Rosann did not press criminal charges, seek a Protection From Abuse Act order, or pursue departmental censure of Kenneth. The majority suggests that because the information could have been publicly disclosed, the Scheetzes had no privacy interest. While it is true that criminal charges could have been brought without Rosann's concurrence, it does not necessarily follow that in spite of the fact that she declined to press charges or take alternative legal action, and no legal action ensued, Rosann Scheetz could have reasonably expected public disclosure of the confidential information that had remained quietly dormant in confidential police department reports.

This is especially true where the public disclosure occurred 16 months after the incident. *See, e.g., Briscoe v. Reader's Digest Ass'n*, 4 Cal.3d 529, 483 P.2d 34, 93 Cal. Rptr. 866 (1971) (common law right to privacy infringed by publication of truck hijacking conviction of 11 years ago); *Melvin v. Reid*, 112 Cal. App. 285, 297 P. 91 (1931) (liability for common law invasion of

privacy imposed upon producers of movie that revealed prior life of prostitution and crime of woman who had long since taken a new name and established a respectable life).[5]

Thus, this case squarely raises an additional factor to consider, namely, "[t]he difficult question . . . as to the effect of lapse of time, and the extent to which forgotten records, as for example of a criminal conviction, may be dredged up in after years and given more general publicity." Prosser, *supra*, at 396. Because this confidential information had lain undisclosed in the confidential police department files for over a year and Rosann Scheetz had not pursued any legal action, the Scheetzes could reasonably have expected that the confidential information would never be publicly disclosed. In light of this delay, I cannot agree with the majority's otherwise appropriate assertion that "[w]hen police are called, a private disturbance loses much of its private character." Information that has remained confidential over a period of time, absent any legal action, can reasonably be expected to recede from public notice.[6]

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5. Clearly, had the authorities acted, the Scheetzes would have lost any reasonable expectation of privacy; moreover, any privacy interest asserted by them would be heavily outweighed by the state's legitimate interest in prosecuting crime (in the case of criminal charges), protecting victims of domestic violence (had there been proceedings under the Pennsylvania Protection From Abuse Act), or maintaining police discipline (had the department instituted disciplinary proceedings against Kenneth).

6. I confine my analysis of the Scheetzes' privacy interest to the situation raised here in which the reporter's source was

II.

Against the Scheetzes' constitutional privacy interest, The Morning Call's free press right guaranteed by the first amendment must be balanced. We have not had previous occasion to balance a constitutional privacy interest against a first amendment interest. *Cf. Fraternal Order of Police*, 812 F.2d at 105 (balancing a constitutional privacy interest against disclosure sought by the government for application for new job openings); *Westinghouse*, 638 F.2d at 570 (balancing employees' constitutional privacy interest in medical records against a disclosure sought pursuant to an OSHA investigation). Nor has the Supreme Court squarely addressed the appropriate balancing test. *Cf. The Florida Star v. B.J.F.*, 491 U.S. 524 (1989) (denying civil liability premised upon a state statute designed to protect the privacy of a rape victim's name); *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979) (no liability for publication of juvenile suspect's name protected by state statute where the paper independently and lawfully obtained the information); *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978) (considering access to

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a copy of confidential as well as non-confidential portions of the police report. I do not address the outcome of a different situation where the reporter may have derived information contained on the confidential portions of the report from another source, *e.g.*, a neighborhood "gossip," a confidante of the Scheetzes, or another source that the Scheetzes may not have reasonably expected to keep their secrets. Here the police department policy established the confidentiality of certain information, making reasonable the Scheetzes' privacy expectations, absent disclosure from another source.

tape recordings admitted into the public record); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978) (criminal sanctions for disclosure of information concerning judicial investigations guaranteed confidentiality under state statute found violative of the first amendment); *Oklahoma Publishing Co. v. District Court*, 430 U.S. 308 (1977) (no liability for publication of juvenile's name, protected by state statute and protective order, where hearing was open to the public); *Cox Broadcasting*, 420 U.S. at 469 (holding that the first amendment forbade a state from prohibiting publication of a rape victim's name that had been released into the public record); *Whalen*, 429 U.S. at 589 (disclosure sought under state statute). Additionally, the tests employed when balancing first amendment values against common law privacy interests vary widely.[7]

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7. Several tests have been employed to define the first amendment value, styled "newsworthiness," against a common law privacy right. *See* Note, *Florida S[tar] v. B.J.F.: The Right of Privacy Collides with the First Amendment*, 76 Iowa L. Rev. 139, 151-52 & n.103 (1990). The Restatement (Second) of Torts § 652D (1977) promotes the application of a community mores standard, applying a standard of offensiveness as determined by community mores. Note, *The Right of Privacy Collides*, *supra*, at 151 n.103. A different standard used in California contains a three-part inquiry. "[First,] the social value of the facts published, [second,] the depth of the article's intrusion into ostensibly private affairs, and [third,] the extent to which the party voluntarily acceded to a position of public notoriety." Diaz v. Oakland Tribune, Inc., 139 Cal. App. 3rd 118, 132 188 Cal. Rptr. 762, 772 (1983). Another standard requires a logical nexus between the information disclosed and a matter of legitimate public interest. *See e.g.*, Ross v. Midwest Communications, Inc., 870 F.2d 271, 275 (5th Cir.), *cert. denied*, 110 S.Ct. 326 (1989); Campbell v. Seabury Press, 614 F.2d 395, 397 (5th Cir. 1980).

Given the facts presented by this case, however, I need not delineate the precise parameters of the appropriate balancing test to be applied and I would leave that refinement for future cases. Here, three facts simplify the resolution of this case.

The first two facts place the Scheetzes' marital disturbance within the realm of public significance protected by the first amendment. First, Kenneth Scheetz's occupation as a police officer renders his domestic conduct, bordering on the criminally actionable, a matter of public significance and concern. Kenneth's position as a law enforcement officer forces the distinction between "'[p]ublic interest,' taken to mean curiosity . . . [and] 'public interest,' taken to mean value to the public of receiving information of governing importance." Bloustein, *The First Amendment and Privacy: The Supreme Court Justice and the Philosopher*, 28 Rutgers L. Rev. 41, 56-57 (1974). Because his occupation in the field of public safety implicates legitimate public interest in his capacity to perform his duties, this case is closer to the latter pole of

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Yet another standard, delineated as the "demonstrative public interest" standard, requires that the press demonstrate some public interest. *See, e.g.*, McNutt v. New Mexico State Tribune Co., 88 N.M. 162, 167, 538 P.2d 804, 807 ("it is neither feasible nor desirable for a court to make a distinction between news for information and news for entertainment"), *cert. denied*, 88 N.M. 318, 540 P.2d 248 (1975). This standard has been criticized as a "leave-it-to-the-press model." Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort*, 68 Cornell L. Rev. 291, 353-55 (1983). Additional factors contributing to public significance include statements of policy or law, the plaintiff's "public figure" status, the passage of time, and the location of the event giving rise to the private fact. Note, *The Right of Privacy Collides*, *supra*, at 152 n.103 (citing cases).

the continuum between gossip and information of governing importance. In the landscape of defamation, the law similarly provides for differing standards of proof for public and private figures. *Compare Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967) (public figures must prove by clear and convincing evidence that an allegedly defamatory statement was made with knowledge of its falsity or in reckless disregard of its truth or falsity) *with Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) (private figures need to show only by a preponderance of the evidence that defamatory statements were negligently made).

Second, and perhaps more importantly, the police officers and the police chief who nominated Kenneth Scheetz for the "Office of the Year Award" were aware of the previous marital incident. The confidential information concerning the Scheetzes' domestic violence, combined with the award to Kenneth, bears upon matters of public significance insofar as it reflects upon the police department. That the department would recommend, for the Officer of the Year Award, an officer whose domestic violence was grist for the police department "rumor mill," could raise public concern regarding police sensitivity to domestic violence issues.[8] The information revealed by the

8. The public interest in this case is arguably even stronger than that articulated in *Florida Star*, 491 U.S. at 524. There the Court found an important, albeit general, public interest in the disclosure of information concerning a rape without further analyzing whether the name of a rape victim was also an item of public significance. *Florida Star*, 491 U.S. at 536-37. In his dissent, Justice White challenged the utility of a rape victim's name to the kind of public knowledge and

police reports arguably could serve to reflect police attitudes toward domestic violence, about which the local community has a strong public interest. "Whatever differences may exist about interpretation of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs." *Landmark Communications*, 435 U.S. at 838 (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)).

At this juncture, the third, and particularly troublesome, factual element of this case becomes determinative in my view: The Morning Call's allegedly unlawful acquisition of the confidential portions of the police report. We have little guidance as to how to factor in this element; the Supreme Court has expressly reserved the question. *See Florida Star*, 491 U.S. at 535 n.8 ("[t]he *Daily Mail* principle does not settle the issue of whether, in cases where information has been acquired *unlawfully* by a newspaper or by a source, government may ever punish not only the unlawful acquisition, but the ensuing publication as well"); *Landmark Communications*, 435 U.S. at 837 ("[w]e are not here concerned with the possible applicability of the statute to one who secures the

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discourse protected by the first amendment. *Id.* at 550-52 (White, J., dissenting).

Here, because the public significance of the Scheetzes' marital disturbance is related to the publicity attending the award given to Kenneth Scheetz, their identity triggers the public significance of the private information. Thus this case does not implicate the question of whether the plaintiff's name, as distinguished from the other facts of public significance, warrants a distinct privacy interest.

information by illegal means and thereafter divulges it").

More recently, however, the Court hinted that the *Daily Mail* line of cases required that "the truthful information sought to be published must have been lawfully acquired." *Cohen v. Cowles Media Co.*, 59 U.S.L.W. 4773 (U.S. June 24, 1991) (holding that the first amendment does not prohibit a plaintiff from recovering damages under state promissory estoppel law against a newspaper for publication of information). The newspaper published the name of a political source in violation of its reporter's promise to preserve the confidentiality of the source. *Id.* at 4774. Relying on cases eschewing the premise that the first amendment grants the press immunity from liability arising out of laws of general applicability, the court concluded that "enforcement of such general laws against the press is not subject to stricter scrutiny than would be applied to enforcement against other persons or organizations." *Id.* at 4775. I find instructive this additional statement:

> Also, it is not at all clear that Respondents obtained Cohen's name "lawfully" in this case, at least for purposes of publishing it. Unlike the situation in *The Florida Star*, where the rape victim's name was obtained through lawful access to a police report, respondents obtained Cohen's name only by making a promise which they did not honor. The dissenting opinions suggest that the press should not be subject to any law, including copyright law for example, which in any fashion or to any degree limits or restricts the press' right to report truthful

information. The First Amendment does not grant the press such limitless protection.

Id. at 4776. Thus, the Court declines to label "lawful" the acquisition of information pursuant to a promise later broken. Clearly, in our case the acquisition of information is at least one degree closer to being unlawful, because *if proven*, The Call and its reporter would have known that the confidential report had been unlawfully acquired.

We recognize that the parties dispute whether Terry Mutchler, the reporter who obtained the confidential reports, actually took them herself or simply received copies from an unnamed state actor. While the presence of a state actor is necessary here to the Scheetzes' section 1983 cause of action, whether The Call's reporter or the state actor took the report does not alter my determination of the first amendment value. There is evidence to show that Terry Mutchler was notified before the offending article went to press that the reports were confidential and that her possession of them was unlawful. If this is proven, The Call then would have been on notice that the reports were in fact confidential and unlawfully acquired.

I would conclude that the fact that The Call acquired private confidential information concerning the Scheetzes' personal life by unlawful means militates against awarding The Call the benefits of its, or its agents', wrongdoing even affording great weight to first amendment values. As this case demonstrates, The Call had ample lawful means of acquiring the information. Had The Call obtained the same information by any of these lawful means, for example, by interviewing

sources to whom the Scheetzes had confided the information or pursuing police disclosure of the confidential report through the Pennsylvania Right to Know Law, 65 Pa. Cons. Stat. Ann. § 66.1, *et seq.* (Purdon's 1959 & Supp. 1991), then it would not have jeopardized its first amendment interest. *See Smith v. Daily Mail*, 443 U.S. at 97 (prohibiting liability where the newspaper obtained confidential information by interviewing witnesses). Drawing this bright line at unlawful acquisition eliminates the need to establish criminal liability in each case. This rule would also serve, in the absence of internal discipline by the press, to enhance the public interest in accurate, verified reporting as well as encouraging lawful acquisition of information.

Weighing the balance in favor of the Scheetzes' privacy interest because The Call unlawfully obtained the information also draws a bright line eliminating the need for ad hoc editorial decision-making that triggers the specter of self-censorship antithetical to first amendment values. *See Ollman v. Evans*, 750 F.2d 970, 978 (D.C. Cir. 1984) ("predictability of decisions, which is of crucial importance in an area of law touching upon First Amendment values, is enhanced when the determination is made according to announced legal standards and when a body of public case law furnishes published examples of the manner in which these standards are to be applied"), *cert. denied*, 471 U.S. 1127 (1985).

This weighing of privacy and first amendment interests comports with the Scheetzes' reasonable expectations of privacy and the steps that they, or others similarly situated, might take to ensure the confidentiality of private facts.

In sum, where confidential information, protected by the constitutional guarantee of privacy, is *unlawfully* acquired, I would hold that the first amendment does not afford the press a defense against civil liability. I would vacate the summary judgment order and remand for further proceedings. Thus, I respectfully dissent.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ROSANN C. SCHEETZ and KENNETH L. SCHEETZ, Jr.	:	CIVIL ACTION
v.	:	
THE MORNING CALL, INC., TERRY L. MUTCHLER, and JOHN DOE and/or JANE DOE	:	No. 89-6755

O R D E R

AND NOW, this 1st day of October, upon consideration of defendants' The Morning Call, Inc. and Mutchler's motion for summary judgment, motion to dismiss, motion in limine, and motion for a protective order, the plaintiffs' motion to compel discovery, and the responses thereto, IT IS ORDERED that:

1. The motion for summary judgment is GRANTED IN PART and DENIED IN PART. Judgment is entered in favor of defendants The Morning Call, Inc. and Mutchler and against the plaintiffs on Counts I and V of the complaint.
2. Counts II, III, IV, VI, VII, and VIII are DISMISSED without prejudice for want of jurisdiction.

3. The motion to dismiss is GRANTED. Defendant Doe is DISMISSED from this action.
4. All other motions are DISMISSED as moot.
5. The clerk is ordered to close the docket of the within case for statistical purposes.

BY THE COURT:

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Edward N. Cahn, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ROSANN C. SCHEETZ and KENNETH L. SCHEETZ, Jr.	:	CIVIL ACTION
v.	:	
THE MORNING CALL, INC., TERRY L. MUTCHLER, and JOHN DOE and/or JANE DOE	:	No. 89-6755

M E M O R A N D U M

CAHN, J. October 1, 1990

The plaintiffs, an Allentown police officer and his wife, have sued the defendants, an Allentown newspaper, one of its reporters, and an unidentified Allentown police officer, under 42 U.S.C. Section 1983 for violating their constitutional right to privacy by publishing the contents of a confidential police report, and under various state laws and constitutional provisions. The plaintiffs seek an order compelling the reporter and an editor of the defendant newspaper to divulge the identity of the

informant who supplied the reporter with the confidential report. The newspaper and reporter oppose this motion, claiming that the informant's identity is privileged. They have also moved for summary judgment on the counts of the complaint that pertain to them and to dismiss the counts that pertain to Officer Doe. This court shall grant the motion for summary judgment, deny the motion to compel, and grant the motion to dismiss.

The background has been laid out in an earlier opinion. Scheetz v. Morning Call, Inc., 130 F.R.D. 34, 35 (E.D. Pa. 1990). Kenneth Scheetz, an Allentown police officer, was named officer of the year. Shortly after, Terry Mutchler, a reporter for The Morning Call, requested the offense report and investigative reports for a rumored assault by Officer

Scheetz upon Mrs. Scheetz over a year before. Chief Stephens denied this request. The Morning Call soon published two stories which disseminated the contents of confidential police investigative reports regarding Mrs. Scheetz's complaint that her husband had assaulted her.[1] The first story (Appendix A to this opinion) contained most of the information found in the investigative reports, including a description of Mrs. Scheetz's injuries, Mrs. Scheetz's statement that she had been assaulted before, and her statement that her husband had refused to seek counseling. The story noted, using information drawn from a second investigative report, that the Scheetzes

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[1]. Mrs. Scheetz dropped the complaint, so no charges were filed.

had since sought counseling. The second story (Appendix B) provided no new material from the reports. Instead, it repeated a description of the effects of the beating.

Officer and Mrs. Scheetz then filed this action under 42 U.S.C. Section 1983. Counts I, V, and IX claim that the defendants (Morning Call, Inc., the publisher of The Morning Call, Terry Mutchler, the reporter who wrote the stories in question, and John and/or Jane Doe, unknown police officials who conspired with Mutchler to release the confidential report, respectively), violated their constitutional right to

privacy.[2] Mutchler is alleged to have conspired with Doe to obtain police investigative reports denied her by the Chief of Police, with the object of publishing them in The Morning Call, also part of this conspiracy. The plaintiffs also assert pendent state claims for violations of the Pennsylvania Constitution and for the torts of invasion of privacy through publication

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[2]. The Scheetzes maintain that the conduct violated their federal constitutional rights to privacy, expression, speech, association, and due process as protected by the First, Fourth, Fifth, Ninth, and Fourteenth Amendments to the Constitution. However, no subsequent briefs refer to the rights of expression, association and due process, and neither legal argument nor competent evidence has been directed to these claims. Although the plaintiffs maintain that these articles have chilled their speech, because they are no reluctant to seek therapy for fear that this fact will be publicized in The Morning Call, their speech on public issues or in public fora has not been chilled. This court shall therefore address only the privacy claims.

of private facts and false-light invasion of privacy.

Through interrogatories and depositions, the plaintiffs sought to discover the identity of the informant (defendant Doe) who supplied the named defendants with the police report and facts regarding the reportorial and editorial processes that underlay the publication of the stories that divulged the confidential information. The deponents, Terry Mutchler, a reporter, and David Migliore-Erdman, an editor, declined to answer these questions, claiming that the questions fell within the area covered by their reportorial and editorial privileges. The plaintiffs then filed a motion to compel. Besides a response, Mutchler and Morning Call filed motions for a protective order, for summary judgment, for judgment on the

pleadings, and to dismiss.[3] This court heard extensive argument on June 25, 1990. Its jurisdiction rests upon 28 U.S.C. Section 1343, with pendent jurisdiction over the state claims.

I. MOTION FOR SUMMARY JUDGMENT

Before this court can address the substance of this motion, it must face the motion for a protective order filed by the defendants. The defendants argue that the summary judgment motion should be decided before the motion to compel is resolved, because a grant of summary judgment would eliminate what need there might be to breach the privilege they assert. In contrast, the plaintiffs argue that the motion to compel must be decided first, because this court's decision on that motion could affect

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[3]. The motion for judgment on the pleadings was denied in an order dated July 2, 1990.

materially the facts relevant to the motion for summary judgment.

Both positions have merit. The defendants are not entirely correct when they argue that a grant of summary judgment completely decides this case; after all, defendant Doe, not a party to the summary judgment motion, would remain a defendant. Still, the motion to compel would of necessity be treated differently if the reporter were not a party to the suit. In addition, removing the named defendants from this action, as will be discussed below, reopens questions about whether it is appropriate for unknown individuals to be parties to an action.

The plaintiffs' point is also well taken. Officer Doe's deposition would contain information directly relevant to this motion. Doe could testify about the events surrounding his or her

transmission of the police investigative report to Mutchler, and about police department policy on the availability of confidential police investigative reports. If this court were to grant the motion to compel, the record on summary judgment would be altered greatly (assuming that Mutchler ultimately complied with this court's order and that Doe proved helpful).

I am guided by Court of Appeals precedents on Federal Rule of Civil Procedure 56(f), and by the general principles concerning summary judgment. Rule 56(f) is properly invoked in response to a summary judgment motion when the non-movant requires more discovery before it can answer the motion. See Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Dowling v. City of Philadelphia, 855 F.2d 136, 139 (3d

Cir. 1988). Rule 56(f) motions must be accompanied by an affidavit outlining the discovery to be conducted and the information to be sought. Radich v. Goode, 886 F.2d 1391, 1393 (3d Cir. 1989); Costlow v. United States, 552 F.2d 560, 562 (3d Cir.1977). When they are properly made, these motions are granted almost as a matter of course. See, e.g., International Raw Materials, Ltd. v. Stauffer Chem. Co., 898 F.2d 946, 949 (3d Cir.1990); Costlow, 552 F.2d at 564.

The plaintiffs did not file a Rule 56(f) motion, and no affidavit of record summarizes the discovery to be undertaken. However, the Court of Appeals has observed that, at times, a motion to compel is enough to alert the court to the need to stay its hand until the discovery is complete. Radich, 886 F.2d at 1394; Dowling, 855 F.2d at 140;

Sames v. Gable, 732 F.2d 49, 52 (3d Cir. 1984). Although a motion to compel has been filed, this does not end the discussion. This court agrees that it cannot resolve a summary judgment motion insofar as it rests upon facts that the discovery that the plaintiffs seek might call into question. After all, Rule 56(c) allows a court to grant summary judgment only if "there is no genuine issue as to any material fact." However, what if the summary judgment motion is, in truth, partly a motion to dismiss, in that it rests in part upon wholly legal arguments? In such a case, provided that the issues are fully briefed, as they have been here, the court would be fully justified in deciding them even in the fact of a motion to compel. Furthermore, there may be mixed issues of fact and law in which the facts are not in dispute,

and for which the requested discovery would shed no light. Here, too, a court would be justified in forging ahead.[4]

Therefore, this court shall tread an intermediate path. I shall consider the summary judgment motion, but I shall assume that all facts that the sought-after discovery might reasonably produce would be entirely favorable for the plaintiff. In doing this, then, this court converts the summary judgment motion into a motion to dismiss for all matters over which discovery would be

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[4]. This court does not advocate resolving issues after a Rule 56(f) motion has been filed. If the non-movant has used a Rule 56(f) motion to delay a court's decision, and thus has not responded to the summary judgment motion, the court cannot decide the summary judgement motion. However, where, as here, the non-movant has responded fully to the summary judgment motion, and has not filed a Rule 56(f) motion, the court may decide the summary judgment motion, if it does not resolve the motion upon a factual ground over which discovery has been sought.

likely to prove fruitful.[5] As a practical matter, this approach will not allow examination of the circumstances leading to Mutchler's receipt of the information, save as a purely legal issue. This approach also saves this court a potentially troublesome foray into the thicket of reportorial privilege, because the motion to compel would have this court order a reporter to divulge the identity of her confidential source.

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[5]. Given this result, these caveats are largely unnecessary; the decision against the plaintiffs is essentially legal and hence does not depend upon statements of fact potentially controverted by proposed discovery. The facts relied upon are either with judicial notice or are not controverted.

Moreover, the plaintiff's recommendation would not aid its position materially. If I were to decide the motion to compel first, I would have to decide that the underlying claims were legally adequate before I could grant the motion. Hence, I would still have to reach the legal merits of the complaint.

As the plaintiffs have brought the federal counts of this action under 42 U.S.C. Section 1983, they must establish "(1) that the conduct complained of was committed by a person acting under color of state law; and (2) that the conduct deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States." Parratt v. Taylor, 451 U.S. 527, 535 (1981); Robb v. City of Philadelphia, 733 F.2d 286, 290-91 (3d Cir. 1984). The defendants challenge both prongs. In addition, they argue that the Press Clause of the First Amendment immunizes them from suit. Should the defendants be correct on any of these points, this court would be obliged to enter summary judgment in their favor on the federal counts. Moreover, because the state counts are before this court on pendent

jurisdiction, they would be dismissed without prejudice were the federal count to drop out. United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966); Tully v. Mott Supermarkets, Inc., 540 F.2d 187, 195-96 (3d Cir. 1976). The defendants' arguments shall be addressed in turn.

A. Under Color of State Law?

The media defendants maintain that the Scheetzes have failed to demonstrate state action, because the named defendants are private actors and because they have not been shown to have entered into an actionable conspiracy with any state actor. They are correct on the first point. There are no allegations that either Morning Call or Mutchler have been clothed with official power, and private actors are not, without more, subject to suit under 42 U.S.C. Section 1983. Lugar v. Edmondson Oil Co., 457

U.S. 922, 941-42 (1982); Melo v. Hafer, No. 89-1925, slip op. at 22 (3d Cir. Aug. 21, 1990); see also Wellman v. Williamson Daily News, Inc., 582 F. Supp. 1526, 1527-28 (S.D.W. Va. 1984) (newspaper not a state actor); Smith v. Butler, 507 F. Supp. 952, 954 (E.D. Pa. 1981) (Luongo, Jr.) (same). Were this all, the media defendants would prevail.

However, the plaintiffs claim that Morning Call and Mutchler conspired with Officer Doe to violate their constitutional rights. Private persons acting in a conspiracy with state officials act under color or state law, provided that the officials take part in the conspiracy in a manner stemming from their state functions. Dennis v. Sparks, 449 U.S. 24, 27-28 (1980); Adickes v. S.H. Kress & Co., 398 U.S. 144, 150-52 (1970); Melo, slip op. at 20; Labov v.

Lalley, 809 F.2d 220, 222-23 (3d Cir. 1987). The defendants, however, they attack the application of this general principle on two grounds.

First, they maintain that there could be no conspiracy to publish the stories, because, on the evidence before the court, the editors of the newspaper learned of this story, and the existence of the information supplied by Doe to Mutchler, only after the transfer had occurred. Because Mutchler, as a reporter, did not have the authority to publish a story, and because there was no contact between Doe and the editors who had that authority, the defendants argue that there was no conspiracy. Corporations, except insofar as they can act only through their officers, cannot be liable under Section 1983 through respondeat superior. See e.g., Iskander

v. Village of Forest Park, 690 F.2d 126, 128 (7th Cir. 1982); Draeger v. Grand Central, Inc., 504 F.2d 142, 145-46 (10th Cir. 1974); Scutieri v. Estate of Revitz, 683 F. Supp. 795, 800 (S.D. Fla. 1988). Also, all the evidence before this court supports the defendants' assertion that Mutchler lacked the authority to approve a story for publication. See, e.g., Erdman Affidavit at paragraph 4.

However, this argument ultimately founders. It cannot be contended that Doe gave the information to Mutchler purely for Mutchler's private delectation. Likewise, Mutchler surely would not have sought the information so assiduously had she not expected to prepare a publishable story. Those involved in this alleged conspiracy acted with a common goal -- namely, to have a story published. To argue that this does

not amount to a conspiracy because the employee of the newspaper who acted with Doe did not have the power to order that a story be printed is to urge an overly cramped view of the law of conspiracy. Were this argument to prevail, a large organization could avoid conspiracy charges simply through a division of labor. Neither is an explicit agreement among the alleged conspirators required; it is established that "an express agreement among the conspirators is not a necessary element of a civil conspiracy." Hampton v. Hanrahan, 600 F.2d 600, 621 (7th Cir. 1979). It is enough that the conspirators share a general conspiratorial objective, which is facially obvious. See Bergman v. Stein, 404 F. Supp. 287, 296 (S.D.N.Y. 1975) (conspiracy between newspaper and state actor recognized in Section 1983 action).

Second, the defendants argue that a conspiracy to violate privacy rights requires a showing of the specific intent to violate the rights, and that there is no such evidence here. This, too, is wrong. Whether Doe, Mutchler, or the editors of The Morning Call intended to violate the Scheetzes' privacy rights is irrelevant; the question is whether they intended to perform the acts that caused the alleged violation of the Scheetzes' privacy rights. See, e.g., Hampton, 600 F.2d at 621. Whatever Doe's motives may have been, he or she presumably released the report in order to have it published; there is no evidence that Doe had any contrary intent, and any other inference would be highly questionable. In this posture, this court cannot say, especially in light of the possibility that Doe would provide evidence

supporting the allegations of a conspiracy, that no conspiracy exists.[6] As a result, this court concludes that the motion for summary judgment cannot be granted on this ground.

Whether state action is present is a different, and unanswered, question. In a similar case, the Court of Appeals for the Tenth Circuit found it necessary to remand to the trial conspiracy between state actors and journalist. Phelps v.

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[6]. Dowd v. Calabrese, 589 F. Supp. 1206 (D.D.C. 1984), cited by the defendants, is inapposite. There the court granted summary judgment on a count alleging conspiracy to defame, holding that specific intent to defame is required to establish a conspiracy to defame. 589 F. Supp. at 1214. First, the hybrid posture of this case makes it impossible to say that Doe would not produce evidence that would support even an extremely narrow view of conspiracy. Second, the Dowd court relied in part on the very wide latitude given media defendants in defamation action. Where, as here, the primary claim is for a violation of civil rights, the strict Dowd rule is unduly weighted toward the defendants.

Wichita Eagle-Beacon, 886 F.2d 1262, 1270-71 (10th Cir. 1989). At this point, given the liberal scope required by this procedural posture, this court shall not grant summary judgment for the defendants.

B. Deprived or What?

The defendants' argument that the plaintiffs have been deprived of no federally-recognized right may be dealt with fairly briefly. In Whalen v. Roe, 429 U.S. 589 (1977), a unanimous Court held that "[t]he cases sometimes characterized as protecting 'privacy' have in fact involved at least two different kinds of interests. One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of personal decisions." 429 U.S. at 598-600

(footnotes omitted). The former is of interest here. The information here is information that Mrs. Scheetz entrusted to the government, information pertaining to a highly personal episode. In Whalen itself, the Court dealt with a New York regulation that required all physicians to forward prescribing information for dangerous drugs to the State Health Department in order that the trade in these drugs might be regulated effectively. A group including patients whose names were on some of these prescriptions sued, claiming that the release of this private information violated their right to privacy. Although the Court ultimately found the statute acceptable, it recognized that a constitutionally protected privacy right existed in those records, both when they were in the possession of their

physicians and when they were in the possession of the state. 429 U.S. at 600. Thus, the Court has recognized that information held by the state may carry with it constitutional privacy protections.

Although the Court has not dealt with a case like this, other courts have. Our Court of Appeals did so in Trade Waste Management Ass'n. Inc. v. Hughey, 780 F.2d 221 (3d Cir. 1985), in which a New Jersey statute requiring that those who wished to operate waste dumps divulge health and criminal justice information to the state was upheld because there was a protectible privacy interest in the disclosure of the information requested. 780 F.2d at 234. Likewise, in Fraternal Order of Police v. City of Philadelphia, 812 F.2d 105 (3d Cir. 1987), the Court of Appeals upheld Police Department

regulations that required applicants for a special investigative unit to release extensive medical, financial, and behavioral information to the Department. There, too, the court found that this information was protected by the Constitution. 812 F.2d at 109-10. Accord In re Search Warrant (Sealed), 810 F.2d 67, 71 (3d Cir. 1987). Many other courts have found that those with personal information in the control of the state retain constitutional protection against its inappropriate disclosure. See, e.g., Walls v. City of Petersburg, 895 F.2d 188, 192 (4th Cir. 1990) (Ervin, C.J.) (family, financial, medical, and sexual information); Slayton v. Willingham, 726 F.2d 631, 635 (10th Cir. 1984) (per curiam) (personal photographs); Plante v. Gonzalez, 575 F.2d 1119, 1132 (5th Cir. 1978) (Wisdom,

J.) (financial information); Woods v. White, 689 F. Supp. 874, 875-76 (W.D. Wis. 1988) (health information); B.J.R.L. v. Utah, 655 F. Supp. 692, 699 (D. Utah 1987) (paternity information); Natwig v. Webster, 562 F. Supp. 225, 226-27 & n.1 (D.R.I. 1983) (arrest records not leading to conviction). In light of this mass of authority, this court concludes that Whalen and its progeny recognize a constitutional right to privacy that encompasses information contained on police investigative reports.[7]

The defendants rely upon Paul v. Davis, 424 U.S. 693 (1976), to support their assertion that there is no protectible privacy interest here. In Paul, the plaintiff sued a chief of police under 42 U.S.C. Section 1983 for

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[7]. I address the waiver of privacy and the weight that the privacy right merits below.

circulating fliers that falsely listed him as a shoplifter; in fact, he had been arrested for shoplifting, but the charges had been dismissed. 424 U.S. at 695-96. The plaintiff argued that the fliers defamed him and violated his rights to privacy. The Court held that his complaint, though perhaps alleging a state-law tort, did not amount to a cognizable Section 1983 claim. For the most part, the opinion dealt with the proposition that state-law claims are not actionable under Section 1983. 424 U.S. at 697-712. The privacy claims were disposed of because the right to privacy was limited to "matters relating to marriage, procreation, contraception, family relationships, and child rearing and education," none of which were involved. 424 U.S. at 713.

The primary aspect of Paul is

irrelevant to this case; although the plaintiffs assert state-law claims, they do so separately from the Section 1983 counts. The secondary argument in Paul, though seemingly harmful to the Scheetzes, was modified by the unanimous opinion in Whalen just one year later. Paul is thus no longer reliable authority on the scope of the privacy right, and the cases referred to above, which explicitly follow Whalen, make that clear. This court, as it must, follows Whalen and the Court of Appeals cases in holding that the Scheetzes possess a right to privacy that may serve as the

basis for a Section 1983 claim.[8]

C. The Press's Privilege

Finally, Morning Call and Mutchler argue that, even if the formal requisites of a Section 1983 action are present, the press's First Amendment rights bar the Scheetzes' privacy claim. First, they maintain that the Press Clause absolutely bars civil liability for the publication of truthful information. Second, they argue that, even if it is constitutional to punish the publication of truthful

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[8]. Many of the other cases referred to by the defendants antedate Whalen, and are thus no longer reliable authority on the scope of the privacy right. See, e.g., Hall v. Pennsylvania State Police, 433 F. Supp. 385 (E.D. Pa. 1976); Mimms v. Philadelphia Newspapers, Inc., 352 F. Supp. 862 (E.D. Pa. 1972); Travers v. Paton, 261 F. Supp. 110 (D. Conn. 1966). This court rejects those cases after Whalen that continue to look to Paul. See, e.g., Wade v. Goodwin, 843 F.2d 1150, 1153 (8th Cir. 1988); J.P. v. DeSanti, 653 F.2d 1080, 1088-89 (6th Cir. 1981); Jones v. Palmer Media, Inc., 478 F. Supp. 1124, 1130 (E.D. Tex. 1979).

information unlawfully obtained, they obtained the information lawfully and thus may assert an absolute privilege. Third, they argue that, whatever the result of the first two questions, the interests advanced by the Press Clause outweigh those that the Scheetzes' have in the constitutional right to privacy, and thus that their actions are privileged. I shall consider these in turn.

1. The Absolute Privilege

The media defendants insist that there is an absolute privilege to publish truthful information, however it is obtained. The plaintiffs concede that there may be no civil penalties when a newspaper publishes truthful information that it has obtained lawfully, but conclude that there may be civil sanctions when the press publishes

information unlawfully obtained.

There is, indeed, an absolute privilege to publish truthful information lawfully obtained. In Cox Broadcasting, Inc. v. Cohn, 420 U.S. 469 (1975), the Court held that a Georgia statute making it a misdemeanor to publish or broadcast the name of a rape victim violated the First Amendment. The Court concluded that the common-law right to privacy, though "plainly rooted in the traditions and significant concerns of our society," faded when the information for which privacy rights were asserted was a matter of public record. 420 U.S. at 491, 492-96.[9]

More recently, Smith v. Daily Mail

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[9]. The Court explicitly chose not to decide "whether truthful publications may ever be subjected to civil or criminal liability consistently with the First or Fourteenth Amendments. . . ." Cox, 420 U.S. at 491.

Publishing Co., 443 U.S. 97 (1979), dealt with a West Virginia statute making it a crime to publish, without court approval, the names of those charged with juvenile offenses. The newspaper indicted under this statute had procured the information by monitoring the police radio frequency and dispatching reporters, who interviewed those present, to the scene of the incident. 443 U.S. at 99. Here, too, the Court found it significant that the information was lawfully obtained, using routine newspaper reporting techniques, and that the matter was of public significance. 443 U.S. at 103. The State's interest in protecting juveniles was, the Court held, overpowered by the rights created by the First Amendment. 443 U.S. at 104.

Finally, and most recently, Florida Star v. B.J.F., 109 S. Ct. 2603 (1989),

stated that a Florida statute rendering unlawful the publication of the names of sexual offense victims was unconstitutional. The newspaper there had procured the information from a police report made available by the police department. 109 S. Ct. at 2605-06. The Court, following Daily Mail, reaffirmed that the publication of truthful information lawfully obtained could be punished only to further the most compelling of state interests. 109 S. Ct. at 2609. In so doing, the Court expressly declined to rule that truthful publication may never be punished. 109 S. Ct. at 2608. More particularly, the Court stated that "[t]he Daily Mail principle does not settle the issue of whether, in cases where information has been acquired unlawfully by a newspaper or by a source, government may ever

punish not only the unlawful acquisition, but the ensuing publication as well." 109 S. Ct. at 2610 n.8.[10] Thus, it remains open whether The Morning Call can be sued under 42 U.S.C. Section 1983 for the invasion of the Scheetzes' constitutional right of privacy where the information published was unlawfully obtained.

The court concludes that the newspaper can. First, a close reading of the cases referred to in footnote eight of Florida Star leads this court to believe that the Court has suggested that civil penalties may, at times, be appropriate. In New York Times Co. v. United States, 403 U.S. 713 (1971) (per curiam), the Court held,

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[10]. It went on to state that "[t]his issue was raised but not definitively resolved in New York Times Co. v. United States, 403 U.S. 713 (1971), and reserved in Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 837 (1978)." 109 S. Ct. at 2610 n.8.

by a vote of six to three, that the New York Times and the Washington Post could not be enjoined from publishing the Pentagon Papers. Prior restraint is, however, a more severe restriction than post-publication civil liability.[11] The seriatim opinions of the justices are more instructive. Justices Black, Douglas, and Brennan held, either explicitly or implicitly, that post-publication restraints would be unacceptable. 403 U.S. at 714-20 (Black, J., concurring); 403 U.S. at 720-24 (Douglas, Jr., concurring); 403 U.S. at 726-27 (Brennan, J., concurring).

In contrast, Justice White, joined by Justice Stewart, found that newspapers could face criminal sanctions for

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11. Sufficiently severe civil liability may, however, have so great a chilling effect upon publication that it has the same effect as a prior restraint. But that is not yet at issue.

publishing confidential information and that he "would have no difficulty in sustaining convictions . . . on facts that would not justify . . . imposition of a prior restraint." 403 U.S. at 735-37 (White, J., concurring). Justice Marshall, in concurrence, and Chief Justice Burger and Justice Blackmun, in dissent, expressly agree with Justice White's statement. 403 U.S. at 745 (Marshall, J., concurring); 403 U.S. at 752 (Burger, C.J., dissenting); 403 U.S. at 759 (Blackmun, J., dissenting). Justice Harlan, though dissenting, did not address the issue. Thus, at least five justices stated, admittedly as dictum, that penal statutes would be

permissible.[12]

Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978), is the other case mentioned in the Florida Star footnote. In Landmark, the Court was faced with a Virginia statute which imposed criminal sanctions for divulging information regarding proceedings before the Virginia Judicial Inquiry and Review Commission. The Court, balancing the First Amendment interests of the media against the deleterious effects disclosure would have on the operation of the Commission, held that this statute

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[12]. This court hastens to note that this reading in no way amounts to a finding of binding precedent. However, the Florida Star Court, as noted above, specifically mentioned that the issue before this court had been "raised but not definitively resolved" in New York Times v. United States. Florida Star, 109 S. Ct. at 2610 n.8. Hence, this exegesis is appropriate as a means of determining, to the extent that the issue was resolved there, just what light New York Times could shed on it.

was unconstitutional. 435 U.S. at 840-42. However, when it did so, it stated that "[w]e are not here concerned with the possible applicability of the statute to one who secures the information by illegal means and thereafter divulges it." 435 U.S. at 837. Moreover, the Court declined to take the categorical position that truthful reporting about public affairs is always insulated from criminal liability -- a position that, even if taken, would not reach the civil liability at issue here. 435 U.S. at 838. Thus, as the Florida Star Court observed, Landmark reserves the issue that faces this court.

It is true, as the defendants point out, that no Court opinion has upheld a

statute restraining the press.[13]

However, the Court has not yet faced this question squarely. What this court can glean from New York Times Co. v. United States leads it to believe that the Court would probably have upheld a statute making illegal the publication of information unlawfully obtained. In addition, it should be noted that the Court's opinions on the publication of truthful information lawfully obtained have, in the main, dealt with non-constitutional interests. These cases thus provide some support for this court's conclusion.

An analogous line of authority is more helpful. The Court has often observed that newspapers are not immune from laws

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13. Though, until recently, this would also have been said about defamation. See Milkovich v. Lorain Journal Co., 110 S. Ct. 2695 (1990).

of general application. See, e.g., Branzburg v. Hayes, 408 U.S. 665, 683 (subpoenas for grand juries); Citizen Publishing Co. v. United States, 394 U.S. 131, 139 (1969) (Sherman Act); Breard v. Alexandria, 341 U.S. 622, 641 (1951) (prohibition of door-to-door solicitation); Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 192-93 (1946) (FLSA); Associated Press v. NLRB, 301 U.S. 103, 132-33 (1937) (NLRA); Grosjean v. American Press Co., 297 U.S. 233, 250 (1936) (taxation).[14] The law in question here, 42 U.S.C. Section 1983, is assuredly not directed against newspapers. It is a powerful weapon for

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[14]. The lower courts have followed suit. For example, in Dietemann v. Time, Inc., 449 F.2d 245 (9th Cir. 1971), the court, through Judge Hufstedler, observed that "[t]he First Amendment has never been construed to accord newsmen immunity from torts or crimes committed during the course of newsgathering." 449 F.2d at 249.

any who find their rights trampled by the state, or by those who connive with it. Indeed, as suggested above, it is the rare case in which a newspaper will find itself a defendant. However, just as here, there are, from time to time, some who believe that a newspaper has acted with the state to deprive them of rights protected by the Constitution of the United States. See, e.g., Phelps, 886 F.2d at 1270.

Finally, there is the line of cases that holds that the newsgathering actions of the press must operate within certain bounds. Journalists undeniably are protected, to some degree, when they seek information; as the Court has observed, "without some protection for seeking out the news, freedom of the press would be eviscerated." Branzburg v. Hayes, 408 U.S. 665, 681 (1972).

Accordingly, reporters are entitled to some protection for "routine newspaper reporting techniques." Daily Mail, 443 U.S. at 103. At the same time, membership in the Newspaper Guild does not grant on a roving commission to violate the laws; as Chief Justice Warren put it, "[t]he right to speak and publish does not carry with it the unrestricted right to gather information." Zemel v. Rusk, 381 U.S. 1, 17 (1965). Thus, the Ninth Circuit Court of Appeals has allowed the fact of publication to provide an element of damages where journalists gained access to the plaintiff's home by subterfuge and took unauthorized photographs and recordings. Dietemann v. Time, Inc., 449 F.2d 245, 249-50 (9th Cir. 1971) (Hufstedler, J.). Likewise, the Second Circuit Court of Appeals found warranted a strict

injunction placed on a photographer who, in the course of attempting to secure photographs of Jacqueline Kennedy Onassis and her children, harassed, abused, and endangered them. Galella v. Onassis, 487 F.2d 986 (2d Cir. 1973). Even Branzburg made clear that journalists could not avoid grand jury testimony in ~~an~~ effort

to retain the confidentiality of sources.[15]

Here, again, the rights of the press to gather news are circumscribed by the rights possessed by others and the obligations due others.

Though the deference owed the press is

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[15]. Those who supply information to the press can be criminally prosecuted. See, e.g., United States v. Wallington, 889 F.2d 573, 576-79 (5th Cir. 1989) (federal statute prohibiting release of confidential information upheld over First Amendment challenge); United States v. Morison, 844 F.2d 1057, 1068-70 (4th Cir. 1988) (Espionage Act conviction of former government employee who supplied classified material to periodical).

There is a distinction between punishing an individual who breaks the law in order that a story may be published and punishing the publisher who prints the story, knowing the information to have been obtained unlawfully. There is also a distinction in the criminal law between thieves and receivers of stolen goods, but both are criminals. This court does not mean to say that the media are liable to the same degree as those who act improperly for it, or those who supply it with improperly-obtained material. But the distinctions are of degree, not of kind.

great, it is one thing to say that it is very hard for the press's rights to be overcome by countervailing considerations, and quite another to say that these rights may never be overcome. It would be peculiar to create absolute immunity for improper actions, though perhaps done to advance a noble aim. Accordingly, this court holds that the press's right to publish truthful information unlawfully obtained is not absolute. It cannot grant summary judgment for the defendants on this ground.

2. Lawfully Obtained?

In order to avoid the Cox Broadcasting-Daily Mail-Florida Star rule, the plaintiffs must be able to show that the newspaper acted unlawfully. The defendants maintain that Mutchler's actions did not proceed beyond routine

newsgathering, and that, in any event, nothing she did could amount to a crime. The plaintiffs have suggested that Mutchler either stole the report or had it stolen for her, making her either a receiver of stolen goods or an accessory to a theft.[16]

The evidence before this court suggests otherwise. Mutchler's affidavit states that, after she was denied access to the investigative report,[17] she contacted various sources in an effort to determine whether one of them had a copy.

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[16]. Although this contention does not appear in the briefs, it was made during oral argument. Transcript, 6/25/90 at 29-30.

[17]. An investigative report consists of all material gathered by the investigating officers. This distinguishes it from the incident report ("face sheet"), which is the form that contains the offense, location, name and address of the complainant, and date and time of the report. See, e.g., Mutchler Affidavit, Exh. B (face sheet and investigative report).

Mutchler Affidavit at paragraph 9. One of these sources thereafter showed her a copy of the original report, which she copied by hand. Affidavit at paragraphs 11-12. She also states that she never had the report and other, related material in her possession, save when she copied the information. Affidavit at paragraph 13. Finally, she states that she never encouraged anyone, much less her source, to steal the report from the police file room. Affidavit at paragraphs 10, 21.

The Pennsylvania theft statute provides that "[a] person is guilty of theft if he unlawfully takes, or exercises unlawful control over, movable property of another with intent to deprive him thereof." 18 Pa. Cons. Stat. Ann. Section 3921 (Purdon 1983). One is guilty of receiving stolen property, a

variety of theft, if "he intentionally receives, retains, or disposes of movable property of another knowing that it has been stolen, or believing that it has probably been stolen . . ." 18 Pa. Cons. Stat. Ann. Section 3925 (Purdon 1983). Assuming that Mutchler's affidavit is entirely correct, it may still be true that Doe committed theft. The theft would not be of the report proper, though, but of the sheets of paper that carried the information. From various depositions, it is clear that the original investigative report was under close control, and thus almost certainly did not leave the building. See, e.g., Koons Dep. at 21-24, 36-37; Houck Dep. at 66-69; Bosha Dep. at 21-23, 34-35. Thus, any copy of it would have to have been made on an Allentown Police Department photocopier, using City of Allentown

paper. If the copy was made with the intent to abstract it, then there was a (petty) theft.

If Mutchler's affidavit is accurate, though, she would not be a receiver of those stolen goods, because she states that she merely copied down the information. However, there are at least three ways in which Mutchler could have performed an illegal act. First, she might be uncandid in her affidavit.[18] If so, she may have received a copy of the report from Doe, thus perhaps making her a receiver of stolen goods (or, for that matter, she might have helped

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[18]. This court hastens to add that it has no reason, on the information before it, to believe that she is lying; rather, it merely holds open the possibility.

organize a theft).[19] Second, she might have committed the tort of conversion if she possessed a copy of the report, however briefly. Baram v. Farugia, 606 F.2d 42, 43 (3d Cir. 1979); Stevenson v. Economy Bank of Ambridge, 413 Pa. 442, 451, 197 A.2d 721, 725 (1964). Third, she might have stolen confidential information, just as one may steal a trade secret. Pennsylvania defines property, for the purposes of the theft statute, as "[a]nything of value, including . . . intangible personal property . . . . " 18 Pa. Cons. Stat. Ann. Section 3901 (Purdon 1983).

Ultimately, this court need decide none of these issues. Although Mutchler is one of the parties to the exchange,

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[19]. Of course, Doe might have had a legitimately-obtained copy of the report, which he copied at his own expense. With Doe's deposition untaken, this court cannot tell what happened.

the other -- Doe -- has not been heard from. What he or she might say is unknown. Because Doe could, if this court granted the motion to compel, provide potentially dispositive information on this area, this court cannot grant summary judgment while the motion to compel is outstanding.

3. Constitutional Balancing

Finally, the media defendants argue that their actions are protected because, in this context, the First Amendment rights that they assert outweigh the constitutional privacy rights of the Scheetzes. The plaintiffs contend that what First Amendment rights Morning Call and Mutchler have are dwarfed by their privacy rights. This balancing is difficult. However, this court concludes that the Press Clause rights of the media defendants must prevail, and, thus, that

summary judgment should be granted for Morning Call and Mutchler.

Before this court can balance these rights, it notes that balancing is legitimate. Time and again, the Court, though reasserting that the rights protected by the First Amendment are fundamental, has made clear that any restriction on speech -- even a prior restraint -- may be permissible if sufficiently compelling reasons warrant it. See, e.g., Near v. Minnesota, 283 U.S. 697, 716 (1931) (prior restraint justifiable); see also, e.g., Perry Educ. Ass'n. v. Perry Local Educators' Ass'n., 460 U.S. 37, 45 (1983) (content-based restrictions justifiable); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976) (time, place, and manner restrictions justifiable). Thus, the

press may not use the First Amendment to trump any and all privacy claims brought against it. Neither, however, may the Scheetzes do no more than assert a constitutional privacy right. As Whalen makes clear, the interests protected by the constitutional right to privacy may be outweighed by significant non-constitutional state interests. Whalen, 429 U.S. at 600-04; see also, e.g., United States v. Westinghouse Elec. Corp., 638 F.2d 570, 577-78 (3d Cir. 1980). Here, too, the privacy right creates no absolute claim to protection.

The cases that have weighed these rights have done so when balancing the interests of the state in advancing a policy or a statute against the rights, whether in speech or privacy, of the individual. However, the general approach presented in these cases applies

here as well. See, e.g., Tavoulareas v. Washington Post Co., 724 F.2d 1010, 1022-23 (D.C. Cir. 1984) (balancing press and privacy rights). As Professor Chafee put it, "there are individual interests and social interests, which must be balanced against each other, if they conflict, in order to determine which interest shall be sacrificed and which shall be protected . . . ." Z. Chafee, Free

Speech in the United States 32 (1954).[20]

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[20]. The media defendants maintain that the proper analysis would have this court treat the Scheetzes' claim as though it was a libel action; this would require that the plaintiffs, though the non-movants, set forth clear and convincing evidence to support all elements of the claim. New York Times Co. v. Sullivan, 376 U.S. 254, 285-86 (1964). However, this test is relevant only where the competing considerations are the constitutional rights of the press, on one hand, and the non-constitutional rights of the allegedly defamed individual, on the other. Because the issue framed in this case presents significant constitutional issues on each side, so strict a test is unwarranted. The defendants are also wrong when they argue that the plaintiffs have had a "full opportunity to conduct discovery." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 257 (1986). The incomplete depositions of Mutchler and Erdman, and the absence of Doe, create significant holes in the discovery that would have to be filled before the defendants' proposal could be effected. Although the rights in conflict do not stand on an equal footing, as the discussion below shows, they are similar in kind, if not in extent, and so an orthodox balancing test is best suited to this analysis.

This court will thus evaluate the competing claims of rights.

a. First Amendment

The general principles here are well-established. As the Court has observed, "[f]reedom of press, freedom of speech, freedom of religion are in a preferred position." Murdock v. Pennsylvania, 319 U.S. 105, 115 (1943). The Court has "recognized that the First Amendment reflects a 'profound national commitment' to the principle that 'debate on public issues should be uninhibited, robust, and wide-open,' and [has] consistently commented on the central importance of protecting speech on public issues." Boos v. Barry, 485 U.S. 312, 318 (1988) (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) (citations omitted). Though expression of any type has a significant measure of

constitutional protection, speech about the conduct of government is especially cherished; as the Court has phrased it, "speech concerning public affairs is more than self-expression; it is the essence of self-government." Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964).

These declarations are reinforced when the Press Clause, rather than just the Speech Clause, is at issue. As Justice Steward has observed, "[t]he publishing business is . . . the only organized private business that is given explicit constitutional protection." Stewart, "Or of the Press", 26 Hastings L.J. 631, 633 (1975). The Framers gave the press explicit protection as it bathed government in the harsh glare of publicity. Thus, for example, in the Cox Broadcasting-Daily Mail-Florida Star line of cases, state interests in limiting the

spread of information were set aside in favor of the rights of a free press.

The scrutiny given state attempts to regulate the content of speech is thus severe; "speech on public issues occupies the 'highest rung of the hierarchy of First Amendment values,' and is entitled to special protection." Connick v. Myers, 461 U.S. 138, 154 (1983) (quoting NAACP v. Claiborne Hardward Co., 458 U.S. 886, 913 (1982)). The test, similar to the strict scrutiny test in equal protection analysis, requires that the state "must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." Perry Educ. Ass'n. v. Perry Local Educators' Ass'n., 460 U.S. 37, 45 (1983).

The stories at issue here are precisely of the type that the courts

have most strongly defended. The first story calls into question the wisdom of the Allentown Police Department, both in failing to investigate internally Mr. Scheetz's assault upon Mrs. Scheetz and in honoring him as officer of the year. A plurality of its space is given to statements by Chief Stephens about why Scheetz received the award (including the assertion that the assault played no factor in the decision), whether the information obtained about Scheetz was stolen, and how women sometimes "tear their dresses and rip their bras and say they were raped." App. A. Other space is given to tributes to Scheetz and discussions about the legality of withholding investigative reports. Less than one-quarter of the article set out the contents of the investigative report.

The second story was again dominated

by quotes from Chief Stephens, who sought to correct "misunderstandings" created by the first story. App. B. He explained that, though he had not investigated the Scheetz assault himself, others in the department had. He also attempted to address the concerns expressed by some callers that he, and his department, attached little importance to complaints of domestic violence. Facts drawn from the investigative report again occupied a relatively small portion of the article.

Thus, the articles' main focus is the Allentown Police Department, not Officer Scheetz. The bulk of each story was comment from the Chief of Police about both the Scheetz matter and related issues. Although the pieces are stories, not editorials, it is clear that the intent was not to titillate readers with eighteen-month-old gossip, or even, as

the plaintiffs' counsel put it, to take a "cheap shot" at the Scheetzes when they were particularly successful.[21] Plaintiffs' Brief Contra Defendants' Motion for Summary Judgment at 25. Rather, the article is about questionable actions by the Allentown Police Department. It is hence especially resistant to attack; as the Court recently observed, "the publication of information relating to alleged governmental misconduct [is] speech which has traditionally been recognized as lying at the core of the First Amendment." Butterworth v. Smith, 110 S. Ct. 1376, 1381 (1990); see also Cox Broadcasting, 420 U.S. at 495 ("[t]he freedom of the press to publish [public records] appears to us to be of critical

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[21]. Whether this may have been the intent behind Doe's release of the information is irrelevant.

importance to our type of government in which the citizenry is the final judge of the proper conduct of public business.").

An editorial could, in general terms, attack Chief Stephens or the Police Department for misconduct (though, since Milkovich, this might prove perilous). But its effect would be minimal with no concrete examples. Though the reporting inevitably discussed Mrs. Scheetz's assault in some detail, it is precisely this detail that lends credence to the broader scope of the stories. In Gilbert v. Medical Economics Co., 665 F.2d 305 (10th Cir. 1981), the plaintiff, a physician whose competence was harshly criticized in an article about the failure of hospital self-policing, sued the publisher for tortious invasion of privacy. In particular, the plaintiff objected to the use of her name,

photograph, and psychiatric and marital history. The court, in holding for the defendant, observed that:

> [T]hese truthful representations are substantially relevant to a newsworthy topic because they strengthen the impact and credibility of the article. They obviate any impression that the problems raised in the article are remote or hypothetical, thus providing an aura of immediacy. . . . While it is true that [the psychiatric and marital information] would fall outside the first amendment privilege in the absence of either independent newsworthiness or any substantial nexus with a newsworthy topic, here they are connected to the newsworthy topic by the rational inference that plaintiff's personal problems were the underlying cause of the acts of alleged malpractice.

665 F.2d at 308-09. As in Gilbert, even the information about psychological therapy was relevant to the tenor of the piece. Mr. Scheetz's earlier refusal to seek therapy makes all the more troublesome any failure by the Police Department to investigate him, as well as

its decision to make him Officer of the Year. The Scheetzes' later decision to seek therapy may have been an attempt to provide balance. In its context, the fact also serves to criticize Chief Stephens, who is quoted immediately after as saying that, once Officer Scheetz told him that the couple had made an appointment for counseling, he saw no reason to inquire further. App. A.

In sum, this court finds that the type of First Amendment right asserted here lies at the core of this fundamental source of our liberties, and that the story is, taken as a whole, devoted to advancing this right. The defendants thus have an extremely weighty right to publish the information that they did.

b. Privacy

The right to privacy, termed by Justice Brandeis "the most comprehensive

of rights and the right most valued by civilized man," has two components. Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). The first is "the individual interest in avoiding disclosure of personal matters." Whalen, 429 U.S. at 599; Wells, 895 F.2d at 192; In re Search Warrant (Sealed), 810 F.2d at 71. The second, more closely related to Griswold, is "the interest in independence in making certain kinds of important personal decisions." Whalen, 429 U.S. at 599-600; see also, e.g., Shields v. Burge, 874 F.2d 1201, 1209 (7th Cir. 1989); Plowman v. United States Dep't. of the Army, 698 F. Supp. 627, 633 (E.D. Va. 1988).

The plaintiffs' claim falls under both headings. The confidentiality right is obvious; significant amounts of information which the plaintiffs believed

confidential was suddenly released in a prominent manner. The autonomy right is less direct. The plaintiffs maintain that their marital relations have been injured by the articles and that they have been reluctant to seek further counseling because of their fear that this, too, would be publicized. The former claim is too indirect to warrant protection under this aspect of privacy. The plaintiffs are correct when they argue that their marital relations are shielded by the privacy right, but a great deal of information, much of it only marginally connected with marital relations, may injure a relationship. For example, a story about a spouse's fraudulent enterprises might well sunder a marriage, yet it would be unreasonable to say that the information was essentially marital. However, the latter

is appropriate. Whether to seek medical care, and the information it yields, are assuredly within the autonomy prong of the privacy right. See, e.g., Whalen, 429 U.S. at 600; Fraternal Order of Police, 812 F.2d at 113; Westinghouse Elec. Corp., 638 F.2d at 577. Indeed, in this respect the Scheetzes' claim very much resembles that in Whalen. There the plaintiffs argued that they were entitled to protection of their controlled drug prescription history because release of the information to the state would dissuade some from seeking appropriate medical attention. Whalen, 429 U.S. at 600. This argument fits well with the facts here; accordingly, both types of privacy interests are germane.

The courts have differed greatly in the approach to take to assertions of the constitutional right to privacy. Whalen

gives little assistance, as it stated no explicit test.[22] Some courts have chosen the strict scrutiny test used in content-based First Amendment cases. See, e.g., Wells, 895 F.2d at 192; Flanagan v. Musser, 890 F.2d 1557, 1570 (10th Cir. 1989); Tavoulareas, 724 F.2d at 1023. However, our Court of Appeals has adopted a more flexible test. In the main, this employs intermediate scrutiny, with strict scrutiny required for severe intrusions upon confidentiality or releases of especially "intimate or personal" information. Fraternal Order of Police, 812 F.2d at 110-12; see also Trade Waste Management, 780 F.2d at 234; Westinghouse Elec. Corp., 638 F.2d at 577-78. In the course of this balancing,

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22. It did refer to the legislation that was upheld as a "reasonable exercise of [the state's] broad police powers," which suggests that it employed a fairly low level of scrutiny. 429 U.S. at 598.

the broader confidentiality right is, in general, weaker than the more focused autonomy right. See, e.g., Kneeland v. NCAA, 650 F. Suppl. 1076, 1081 (W.D. Tex. 1986).

i. Confidentiality

Most of the information in question is protected by a privacy claim solely because of the Scheetzes' protectible interest in its confidentiality. Thus, this court must consider whether the Scheetzes had any reasonable expectations that the information in the report would remain private. Fraternal Order of Police, 812 F.2d at 112.[23] Making a police report could be called at least a partial waiver of confidentiality.

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[23]. Although the constitutional right to privacy is not defined by state statutes and policies, they "may inform our judgment concerning the scope" of that right. Flanagan, 890 F.2d at 1571; see also, e.g., Westinghouse Elec. Corp., 638 F.2d at 578.

After all, much of the point in filing a complaint is to secure police action that may result in arrest and conviction, and court records are almost without exception public. See, e.g., Florida Star, 109 S. Ct. at 2608; Cox Broadcasting, 420 U.S. at 492. Furthermore, Mrs. Scheetz did not, in principle, control whether Mr. Scheetz would be prosecuted; if probable cause is present, the police may make an arrest (though they would seldom do so if the complainant were unwilling to proceed).

However, our Court of Appeals has held that that portion of a bill of particulars which contained a list of unindicted co-conspirators could be sealed from press access, because the potential harm to "the privacy and reputational interests of the named individuals" was immense. United States

v. Smith, 776 F.2d 1104, 1114 (3d Cir. 1985). The same logic applies to dropped complaints; a complaint may be baseless and vindictive, but the fact that it has been filed may bring harm to an innocent person. Furthermore, over a year had elapsed from the time that the complaint was filed to the time of the stories. Even if Mrs. Scheetz might have been held to have waived part of her expectation of privacy when she filed the complaint,[24] by the time of the stories she, and her husband, might justifiably have relied upon the inaction and upon the assurance that no prosecution would result. Reporting the incident to the police thus did not abrogate the expectation of

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[24]. More precisely, she would have made a limited waiver insofar as the information was known by those officers working on the case (not a relevant consideration here), as well as a broader waiver contingent upon prosecution.

privacy.[25]

However, other matters related to the events may have diminished the privacy expectations in certain of the facts. First, Mrs. Scheetz reported a disturbance at her home on January 14, 1988 -- the sum of the information reported on the incident report. Although Chief Stephens denied this report to Mutchler, he appears to have done so improperly. The Pennsylvania courts, construing the Pennsylvania Right-to-Know Act, Pa. Stat. Ann. tit. 65 Section 66.1(2) (Purdon Supp. 1990), have held that police blotters (which contain essentially the same information as

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[25]. It might be added that this is a desirable result, at least in this context, for wholly independent policy reasons. If a woman knew that she had no expectation of privacy, leaving prosecution aside, if she summoned the police after she was abused, she would be more reluctant to summon them.

incident reports) are public records within the meaning of the statute and must be made available to the public. See, e.g., Lebanon News Publishing Co. v. City of Lebanon, 69 Pa. Commw. 337, 341-42, 451 A.2d 266, 268 (1982); In re Cambria County Clerk of Courts, 13 D. & C.3d 710, 711 (Cambria C.P. 1980). Assuming that Mutchler had chosen the orthodox method to secure Right-to-Know Act information from recalcitrant officials -- a lawsuit pursuant to Pa. Stat. Ann. tit. 65, Section 66.4 (Purdon Supp. 1990) -- she would surely have received the incident report. In light of this clear public policy, it cannot be said that the Scheetzes had a reasonable expectation of privacy in these facts.

In contrast, police investigative reports are not considered public records for the purposes of the Right-to-Know

Act, and do not have assured public access. See, e.g., Barton v. Penco, 292 Pa. Super. 202, 206, 436 A.2d 1222, 1224 (1981); Sullivan v. City of Pittsburgh, 561 A.2d 863, 864-65 (Pa. Commw. 1989). Whether the Scheetzes would have reasonable expectations of privacy would thus depend upon departmental policy. At the time of the stories, the Allentown Police Department had recently adopted a policy under which incident reports would be made available freely, but supplemental information could be released "only at the discretion of the Shift Commander." Stephens Dep. at Exh. 7. The deponents dispute whether The Morning Call, which was consulted when this policy was drafted, assented to it. Compare Erdman Dep. at 28-48 (no assent) with Stephens Dep. at 120-22 (assent). For these

purposes, it is enough to note that The Morning Call was aware of the policy. Likewise, there are differences of opinion about how often supplemental reports were released. Compare Rendish Dep. at 45-47, 57-58 (virtually never) with Mutchler Dep. at paragraph 16 (repeatedly). Because the defendants are the movants, this court must conclude that the reports were almost never released. Thus, the Scheetzes had a reasonable expectation that the investigative report would remain confidential.

That the report might be confidential does not, however, mean that the information on it is confidential, if it was known independently to a significant number of people. A classified document may contain a commonplace fact, but the commonplace fact does not thereby become

classified. The last step in this part of the privacy inquiry is to ask to what extent Mutchler might have procured the information without resort to confidential documents; to the extent that she had independent sources for these facts, the privacy right that the plaintiffs seek to assert is diluted. The difficulty for the Scheetzes is the somewhat public atmosphere in which many of the January, 1988 events happened. Though the assault appears to have gone unwitnessed, Mrs. Scheetz spent the night in the police station. There she was seen by a significant number of police officers, who made the facts of the incident fairly common knowledge around the Police Department.[26] See, e.g.,

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26. An incident of this sort involving the wife of a police officer would attract more attention and comment than the equivalent incident involving an outsider.

Koons Dep. at 27-28, 46-48; Houck Dep. at 58-61. As the investigative report indicated, some of Mrs. Scheetz's injuries were visible. Mutchler Affidavit at Exh. B. In light of this uncontroverted evidence, this court concludes that there was at least general knowledge within the Department about the January incident from its occurrence onward.[27]

To summarize, the Scheetzes would not have a reasonable expectation of privacy in the fact that an incident occurred, though they would in the supplemental

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[27]. The plaintiffs argue that the lull in discussion of the incident, as shown by the deposition testimony, shows that the incident was no longer a prominent event. See, e.g., Koon Dep. at 28; Bosha Dep. at 37-40. More likely, though, the matter was discussed only when there was some occasion to do so--first when it occurred, and then when Mr. Scheetz received his award. As Ms. Bosha, then a civilian employee of the Police Department, observed, the eating was "public knowledge." Bosha Dep. at 40.

reports as such. The general situation seems to have become widely-known within the Police Department when the assault occurred, and some of the events and facts were probably witnesses by a significant number of people. These facts yield a somewhat attenuated expectation of privacy as to the broad outlines of the January incident, with greater protection for the details.

ii. Autonomy

The facts here are those about psychological counseling; first, that Mr. Scheetz had refused to see a counselor, in spite of his wife's request, and, second, that the Scheetzes had arranged to see a psychologist. This court need not repeat the discussion above, which does little to suggest that this privacy interest might have been weakened by free disclosure. Whether the Scheetzes had

sought counseling would not be physically obvious, and there is no evidence that she told anyone of this except the officers who responded to her call. As the Court of Appeals has observed, information about one's behavior and medical treatment should receive strong privacy protection. Fraternal Order of Police, 812 F.2d at 113, 116-17; see also, e.g., Westinghouse Elec. Corp., 638 F.2d at 577. This is especially so when the ability to seek care is jeopardized by a violation of privacy rights. Whalen, 429 U.S. at 600.

In contrast to much of the material above, this court concludes that the information about psychological consultations was the sort that the Scheetzes might reasonably have expected to keep private. With the only identified source, the investigative

report, kept entirely within the Police Department, and with no outward indicia of the existence of a lack of counseling, there would not have been a waiver by disclosure. Moreover, the sensitivity of medical information warrants significant protection. This provides the strangest support for the Scheetzes' claim.

iii. Balancing

After comparing the competing constitutional claims, this court finds that the defendants' claims prevail. First, Press Clause claims are weightier than privacy claims. First Amendment rights are fundamental, and attempts to punish the content of speech, as this use of 42 U.S.C. Section 1983 would, are strictly scrutinized. In contrast, the Court has embraced privacy rights more tentatively. The leading case, Whalen, appeared to use a rational basis test,

though it stated no explicit standard, and our Court of Appeals has used an intermediate scrutiny/sliding scale test to evaluate privacy claims. For the most part, the plaintiffs' privacy claims are of confidentiality, more peripheral than the Griswold-based autonomy claims. Given these different levels of scrutiny, this court must accord the First Amendment claims more deference than the privacy claims.

The actual claims made also weigh in favor of the defendants. The articles concerned the conduct of the Allentown Police Department, with its treatment of Officer Scheetz as the focus. Most of each article was directed toward the Police Department's conduct, not Officer Scheetz's. This type of speech--comment on public affairs -- goes to the core of the First Amendment. The privacy

claims are generally weaker. Much of the information had long been the subject of departmental gossip, which provided the basis for Mutchler's initial interest. Some was even a matter of public record (the information on the incident report). Although this court agrees that the contents of the investigative reports are entitled to privacy protection, insofar as they have not become common knowledge, the extent of the privacy right does not reach that of the First Amendment right advanced here.

The autonomy claims fall nearer the borderline. Seeking medical treatment is part of the core of the privacy interest, and the threat of continued publicity for any future visits to a psychologist could deter the Scheetzes from seeking assistance. Moreover, there is no evidence that the facts about

psychological assistance had been publicized before the stories. The First Amendment rights remain strong, but the rationale is weaker. Mr. Scheetz's early refusal to seek assistance does, however, add weight to the charge, implicit in the article, that he should not have received the award and that the Police Department should have taken sterner measures. Similarly, mentioning the couple's later appointment with a counselor could be justified as an attempt to balance the portrayal of both Scheetz and the Department or as background for a further indictment of Chief Stephens, who stated that he had not followed up his queries to insure that the couple had kept the appointment or that they had continued to secure assistance.

With a stronger privacy interest and a weaker First Amendment rationale, the

defendants' decision to release these facts is less easily supported. Nevertheless, this court finds for the defendants here as well. Even if the justification is weaker, it is still real, and the speech of which it is a part still rests at the core of the First Amendment. Given this, and given the extra weight that this court must give First Amendment claims, even the stronger privacy claims cannot succeed.

Two general comments are appropriate here. First, though this court finds that the newspaper was legally justified in publishing the facts about psychological treatment, it does not find that the newspaper should have published them. The marginal benefit was not immense, and the potential for harm was significant. Newspapers, no less than other actors in our society, must bear in

mind the consequences of their actions. Those involved with these stories should have thought long and carefully before they chose to release this information. However, this court must use its hindsight sparingly; as one court put it, "[e]xuberant judicial blue-pencilling after-the-fact would blunt the quills of even the most honorable journalists." Ross v. Midwest Communications, Inc., 870 F.2d 271, 275 (5th Cir. 1989) (Higginbotham, J.). This is at least implied by the pronounced deference that the Court has given the press on matters of public import. Were this court one of manners or ethics, it might well reprove the defendants; because it is one of law, it cannot.

Second, this test should allay the fears expressed by the defendants that allowing civil sanctions for the

publication of truthful information would, for example, have kept Watergate from the public eye. This court agrees that our society is nourished by investigative journalism, and it agrees that a rule of law that chilled investigative journalism would be unwise. However, the balancing test that this court has set forth does no such thing. When the press reports on matters of public import, its reports are protected by the core of the First Amendment. Only the most compelling of countervailing interests could possibly yield liability.[28]

This test does grant greater

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[28]. For example, President Nixon would have lost a suit against Messrs. Woodward and Bernstein; the information they produced could not possibly have rested nearer the essence of the First Amendment, and what limited confidentiality claims Nixon could have advanced would thus have been defeated.

protection where the story rests in the facts it reveals, rather than in the public situation it illuminates. This sort of story lies far from the core of the First Amendment, and thus privacy claims may well prevail. Suppose, for example, that a newspaper conspired with a Health Department official to obtain a list of those who had tested positive for AIDS, and then published the list. The privacy interest would be compelling, both under the confidentiality prong and under the autonomy prong. For the former, health records, as discussed above, fall well within the range of privacy; for the latter, one would be less likely to seek state assistance when one was concerned about the possibility of AIDS if one knew that the state's records could be found on the pages of the next day's newspaper. Thus, the

courts have uniformly found strong privacy rights when individuals have brought Section 1983 actions against the state for releasing HIV test results. See, e.g., Doe v. Borough of Barrington, 729 F. Supp. 376, 384-85 (D.N.J. 1990); Woods v. White, 689 F. Supp. 874, 875-77 (W.D. Wis. 1988). This court would have no trouble finding for the plaintiffs in that case, were the defendants to file a summary judgment motion.

But that is not the case before this court. In this case, with, on one side, a much stronger First Amendment interest, and, on the other, a weaker privacy interest, this court must reach a different result. Accordingly, this court finds that the defendants are entitled to summary judgment on Counts I and V of the complaint. Because these counts provide the entire basis for

federal jurisdiction over Counts II, III, IV, VI, VII, and VIII of the complaint, these shall be dismissed without prejudice.[29]

II. MOTIONS TO COMPEL AND TO DISMISS

Although Doe is the sole remaining defendant, the motion to compel remains open. Here, the countering motion, filed by the erstwhile defendants,[30] is a motion to dismiss. Their argument is based on this court's earlier ruling that Doe could remain a defendant until a

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[29]. Even though, at the moment, Doe remains in this action, this court cannot exert pendent party jurisdiction under 42 U.S.C. Section 1983. Aldinger v. Howard, 427 U.S. 1, 17 (1976).

[30]. Morning Call and Mutchler, no longer in this action, may have no standing to move to dismiss Doe. Even if this is true, it is irrelevant; this court has a continuing obligation to question its own jurisdiction, and I can, on my own motion, dismiss an action if I find my jurisdiction wanting. Especially in light of Doe's obvious inability to move on his or her own behalf, this court sees no difficulty in acting here.

reasonable time for discovery had elapsed. They maintain that the plaintiffs have had more than ample discovery, and yet have not managed to name Doe. As a result, they argue, Doe must be dismissed.

The plaintiffs argue that, though a great deal of discovery has taken place, one critical piece -- the subject of the motion to compel -- has not. Clearly, the material sought would solve the problem set forth by the former defendants. Thus, argue the plaintiffs, the motion to compel must precede the motion to dismiss. The plaintiffs raise a valid point; again assuming that Mutchler were to obey an order compelling her to divulge her source, the plaintiffs could amend the complaint to name Doe. However, they shall not prevail on the larger question: whether Doe can remain

in the action.

The basis for dismissal arises from the due process problems to which this court adverted in its earlier opinion on the validity of Doe defendants. Scheetz, 130 F.R.D. at 37. Until Doe is identified, all actions that anyone takes in this case are ex parte. This was not a great problem when other defendants sharing Doe's interests could effectively represent Doe. Now, though, the sole defendant has not received the complaint, appeared by counsel at depositions, or argued his case through motions or in person. It is quite possible that Doe has actual notice of at least some of the proceedings in this case. But this differs by far from the type of notice that comports with the requirements of due process.

This court's earlier opinion is not to

the contrary. In most of the cases in which fictitious defendants have been found permissible, other identified defendants were also parties and could represent the evanescent defendant's interests. See, e.g., Abels v. State Farm & Cas. Co., 770 F.2d 26, 31-32 (3d Cir. 1985); Varlack v. SWC Caribbean, Inc., 550 F.2d 171, 174-75 (3d Cir. 1977); Bufalino v. Michigan Bell Tel. Co., 404 F.2d 1023, 1028 (6th Cir. 1968); Fludd v. United States Secret Service, 102 F.R.D. 803, 805 (D.D.C. 1984). Alternatively, as in Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971), the defendants were officials sued in their official capacity. Consequently, the agency employing them would have been served with process and would have represented their interests. Here, there has been no such notice or

representation; the Scheetzes never served the City of Allentown or its police department with the complaint, even though Officer Doe has, from the start, been identified as an employee of the City of Allentown. Complaint, paragraph 7. Therefore, it would be inappropriate for this action to continue

against Doe.[31] This court shall thus dismiss Doe from the action.[32]

III. CONCLUSION

To summarize, this court agrees with the plaintiffs that newspapers may be

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[31]. Furthermore, the plaintiffs should not be able to secure by pleading Doe initially what they cannot secure by Federal Rule of Civil Procedure 15. Had this court held that Rule 15 provided the sole means for adding parties to an action, this section of this opinion would be superfluous; the two real defendants would have disappeared, and the case would be closed. When this court allowed the complaint against Doe to proceed, it did not intend to allow the plaintiffs to circumvent the principles behind the Federal Rules of Civil Procedure. Because the plaintiffs cannot meet the requirements of Rule 15(c) on relation back of amendments (because there was no mistake about the identity of the proper party), allowing this complaint to proceed would create a gap in which there would be no tangible defendant. However liberal our Rules, they do not contemplate a plaintiff proceeding without a defendant, save in the most extraordinary of circumstances (for example, temporary restraining orders; and those expire in short order).

[32]. Of course, this dismissal is without prejudice to raise these claims should Doe be identified.

held civilly liable for the publication of truthful information unlawfully obtained. It also agrees that, given the incomplete record, summary judgment is not warranted over the elements of a Section 1983 action. It is only at the final step that this court parts company with the plaintiffs. Because this action pits one constitutional right against another, as is inevitable in a Section 1983 action against the media, this court finds that the best approach is to balance the rights, taking account of the importance of each right and of the extent to which the behavior in question is protected by each right.

The articles present information that, almost without exception, goes to the core of the First Amendment -- comment on public affairs, and, in particular, on public misconduct. Moreover, First

Amendment rights are fervently guarded by the courts. The Scheetzes, on the other hand, have a relatively modest privacy interest in most of the facts at issue, and the courts have not granted privacy rights the same deference as First Amendment rights. This court must thus find for the named defendants. Due process requires that Doe be dismissed as well.

This decision has not come easily. Indeed, at oral argument this court stated that it was inclined to grant the motion to compel. This comes in part because, when two rights collide, one must suffer; thus, the Scheetzes, already deprived of their constitutional right to privacy, are deprived of redress as

well.[33] This court sympathizes with the Scheetzes. As this court stated above, whether the defendants should have released the information about Mr. Scheetz's initial unwillingness to see a psychologist and the couple's later resort to one is very questionable as a matter of propriety. Just because we possess rights does not mean that we must exercise them to the hilt at every opportunity; though we enjoy rights to free speech, we would be ill-advised to celebrate them by vilifying each other on the slightest pretext. Whatever this court thinks of parts of the defendants' behavior, though, it would be false to the precepts of our Constitution if it permitted this action to proceed. The

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[33]. Though they retain their state law causes of action against Mutchler and Morning Call, as well as any claims they may have against Doe.

prospect of vast liability would chill journalism in a manner too dangerous to accept.

John Marshall, in a passage quoted approvingly by James Madison, addressed this subject in a day when the press took even greater delight in flaying public officials than does ours. I can think of no better conclusion than to adopt his words.

> Among those principles deemed sacred in America, among those sacred rights considered as forming the bulwark of their liberty, which the Government contemplates with awful reverence and would approach only with the most cautious circumspection, there is no one of which the importance is more deeply impressed on the public mind than the liberty of the press. That this liberty is often carried to excess; that it has sometimes degenerated into licentiousness, is seen and lamented, but the remedy has not yet been discovered. Perhaps it is an evil inseparable from the good with which it is allied; perhaps it is a shoot which cannot be stripped from the stalk without wounding vitally the plant from which it is torn. However

> desirable those measures might be which might correct without enslaving the press, they have never yet been devised in America.

6 Writings of James Madison, 1790-1802 336 (G. Hunt ed. 1906) (emphasis in original).

An order follows.

BY THE COURT:

Edward N. Cahn, J.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 90-1783

ROSANN C. SCHEETZ;
KENNETH L. SCHEETZ, JR.,
Appellants

v.

THE MORNING CALL, INC.;
TERRY L. MUTCHLER;
JOHN DOE and/or
JANE DOE

SUR PETITION FOR REHEARING

Present: SLOVITER, Chief Judge, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, and RONEY* Circuit Judges

The petition for rehearing filed by appellants in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular

active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied. Judge Mansmann would grant rehearing for the reasons set forth in her dissent.

By the Court,

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Circuit Judge

Dated: October 31, 1991

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* Judge Roney voted only on panel rehearing.

INSPECTION AND COPYING OF RECORDS

(65 P.S. Sections 66.1 et seq.)

Section 66.1 Definitions

In this act the following terms shall have the following meanings:

(1) "Agency." Any department, board or commission of the executive branch of the Commonwealth, any political subdivision of the Commonwealth, the Pennsylvania Turnpike Commission, or any State or municipal authority or similar organization created by or pursuant to a statute which declares in substance that such organization performs or has for its purpose the performance of an essential governmental function.

(2) "Public Record." Any account, voucher or contract dealing with the receipt or disbursement of funds by an agency or its acquisition, use or disposal of services or of supplies, materials, equipment or other property and any minute, order or decision by an agency fixing the personal or property rights, privileges, immunities, duties or obligations of any person or group of persons: Provided, That the term "public records" shall not mean any report, communication or other paper, the publication of which would disclose the institution, progress or result of an investigation undertaken by an agency in the performance of its official duties, except those reports filed by agencies pertaining to safety and health in industrial plants; it shall not include

any record, document, material, exhibit, pleading, report, memorandum or other paper, access to or the publication of which is prohibited, restricted or forbidden by statute law or order or decree of court, or which would operate to the prejudice or impairment of a person's reputation or personal security, or which would result in the loss by the Commonwealth or any of its political subdivisions or commissions or State or municipal authorities of Federal funds, excepting therefrom however the record of any conviction for any criminal act.

Section 66.2 Examination and inspection

Every public record of an agency shall, at reasonable times, be open for examination and inspection by any citizen of the Commonwealth of Pennsylvania.

Section 66.3 Extracts, copies, photographs or photostats

Any citizen of the Commonwealth of Pennsylvania shall have the right to take extracts or make copies of public records and to make photographs or photostats of the same while such records are in the possession, custody and control of the lawful custodian thereof or his authorized deputy. The lawful custodian of such records shall have the right to adopt and enforce reasonable rules governing the making of such extracts, copies, photographs or photostats.

Section 66.4 Appeal from denial of right

Any citizen of the Commonwealth of Pennsylvania denied any right granted to him by section 2 or section 3 of this act, may appeal from such denial. If such court determines that such denial was not for just and proper cause under the terms of this act, it may enter such order for disclosure as it may deem proper.